

## **TRANSCRIPT OF RECORD**

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### **Supreme Court of the United States**

**OCTOBER TERM, 1961**

**No. 49**

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**ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY, ET AL., APPELLANTS,**

*vs.*

**ELVIN L. REDDISH, ET AL.**

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**No. 53**

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**INTERSTATE COMMERCE COMMISSION,  
APPELLANT,**

*vs.*

**ELVIN L. REDDISH, ET AL.**

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**No. 54**

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**ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,  
APPELLANTS,**

*vs.*

**ELVIN L. REDDISH, ET AL.**

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**APPEALS FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS**

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**NO. 49 FILED FEBRUARY 10, 1961**

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**NO. 54 FILED FEBRUARY 14, 1961**

**PROBABLE JURISDICTION NOTED APRIL 17 1961**



# SUPREME COURT OF THE UNITED STATES

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APPEALS FROM THE UNITED STATES DISTRICT COURT  
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[File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

Civil Action No. 405

---

ELVIN L. REDDISH, an individual, 711 Shipley Street,  
Springdale, Arkansas, Plaintiff

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, Defendants

---

COMPLAINT OF ELVIN L. REDDISH—Filed January 27, 1960

This is an action to review, enjoin, suspend and set aside orders of the Interstate Commerce Commission. This Court has jurisdiction of this action under §§ 205(g), (h) and 17 of the Interstate Commerce Act, 49 U.S.C. 305(g), (h) and 17 and under 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325.

1. The plaintiff, Elvin L. Reddish (hereafter "plaintiff") is a citizen of the United States and a citizen and resident of the State of Arkansas. He resides and has his principal place of business at Springdale, Arkansas.

2. Plaintiff was granted on June 12, 1958 by the Interstate Commerce Commission a temporary operating authority to transport, as a contract carrier, canned goods for the Steele Canning Company from Springdale, Lowell and Ft. Smith, Arkansas and Westville, Oklahoma, on the one hand, and, on the other, numerous specified points in some thirty-three states. A copy of this temporary authority is attached as Exhibit A. Plaintiff was subsequently granted temporary authority to transport on return to Springdale from certain of these points cans, lids and corrugated boxes used by Steele Canning Company in its canning business. A copy of this temporary authority

is attached as Exhibit B. These temporary authorities were issued under section 210a(a), 49 U.S.C. §310a(a), for E. L. Reddish to provide transportation for which there was an immediate and urgent need and for which no other [fol. 2] carrier service was available. The effective period of these temporary authorities was extended from time to time and finally was indefinitely extended to the date of final determination by the Commission of the application by plaintiff for permanent operating authority to perform this transportation.

3. Plaintiff, on May 13, 1958, filed an application pursuant to section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b) as amended August 22, 1957, for permanent authority to operate as a contract carrier by motor vehicle in interstate commerce. This application was assigned docket number C-117391 by the Commission. The application sought authority to operate as a contract carrier for Steele Canning Company and Cain Canning Company of Springdale, Arkansas and Keystone Packing Company of Ft. Smith, Arkansas, transporting for them (1) canned goods from Springdale, Lowell and Ft. Smith, Arkansas and Westville, Oklahoma to their customers in a number of states and (2) transporting on return trips for these named canning companies canned goods and materials and supplies used by them in the production of canned goods.

4. Plaintiff's application MC-117391 was the subject of hearings on June 23, and October 20, 1958 before a hearing examiner assigned to the proceeding. At the hearings a number of railroads and motor common carriers intervened in opposition to the application.

5. The hearing examiner in his written report served January 2, 1959 found, on the evidence of record, that plaintiff's application in all material respects should be granted. A copy of the Report and Recommended Order is attached hereto as Exhibit C. In reaching this conclusion the hearing examiner found, *inter alia*, that the service proposed by Reddish would be more responsive than that otherwise available to the needs of the canning companies; that the grant of the application would not



have any material adverse effect upon the operations of any other carrier. The Examiner in his Report noted the testimony of the representatives of the named canning companies to the effect that competitive conditions in the canning industry would force out of business any canning company which was required to ship in less-than-truckload quantities at less-than-truckload rates. The Examiner further [fol. 3] then noted the evidence of the representative of the canning companies that the alternative to the use of a contract carrier was not the use of rail or motor common carrier service but the re-establishment of private trucking operations by the canning companies.

6. Exceptions were filed by some of the protesting railroads and motor carriers to the Report and Recommended Order.

7. Division 1 of the Commission in a Report dated June 30, 1959 and served July 7, 1959, adopted the statement of facts of the Examiner but concluded that the application should be denied in its entirety. A copy of the Report and Order of Division 1 of the Commission is attached hereto as Exhibit D. Division 1 of the Commission concluded that under the provisions of Section 209(b) of the Interstate Commerce Act as amended August 22, 1957, the applicant was required to show that there did not exist common carriers by motor vehicle and by railroad physically capable of transporting such commodities; that transportation by Reddish of canned goods for these specific canners, although never handled by the opposing common carriers by rail or motor, would have a material adverse effect upon the common carriers; and that the need of the canner to secure lower cost transportation by the use of a contract carrier than that available under the less-than-truckload service by common carrier by motor and rail was to be disregarded under the statute.

8. Plaintiff requested oral argument and reconsideration by the entire Commission of the Order of Division 1. Oral argument and reconsideration was denied by the entire Commission by an Order dated December 16, 1959 and received by Reddish on January 6, 1960. A copy of

this Order is attached as Exhibit E. Plaintiff has exhausted its administrative remedies before the Commission.

9. The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 are erroneous and void as a matter of law for the reason that the Interstate Commerce Commission has failed to apply the standards set out in section 209(b) of the Interstate Commerce Act as amended August 22, 1957, 49 U.S.C. 309(b), to the application of plaintiff for authority to operate as a contract carrier.

[fol. 4] 10. The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 are erroneous and void as a matter of law for the reason that the Interstate Commerce Commission denied the application under an erroneous application and interpretation of section 209(b) of the Interstate Commerce Act as amended August 22, 1957, 49 U.S.C. § 309(b).

11. The Orders of the Interstate Commerce Commission dated June 30, 1959 are erroneous and void as a matter of law for the reason that the Interstate Commerce Commission refused to consider relevant evidence in an application proceeding under section 209(b) of the Interstate Commerce Act as amended August 22, 1957, 49 U.S.C. § 309(b).

12. The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 are erroneous and void as a matter of law for the reason that they are arbitrary and capricious and without foundation in substantial evidence in the record considered as a whole.

Wherefore, plaintiff prays that:

1. Process issue against defendant, United States of America and the Interstate Commerce Commission;
2. The Court, as soon as may be practicable after filing of this complaint, call to its assistance for hearing and determination of the issues, two other

judges, one of whom shall be a Circuit Judge as provided by 28 U.S.C. § 2284.

3. An order be issued by this Court enjoining, setting aside, annulling and suspending the orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959;
4. This Court grant plaintiff such other and further relief as may be lawful, just and proper in the premises.

John H. Joyce, 26 North College, Fayetteville, Arkansas, Attorney for Plaintiff.

A. Alvis Layne, Pennsylvania Building, Washington 4, D. C., Of Counsel.

[fol. 55]

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION  
Civil Action No. 405

---

ELVIN L. REDDISH, an individual, Plaintiff,

—v.—

UNITED STATES OF AMERICA and  
INTERSTATE COMMERCE COMMISSION, Defendants.

---

TEMPORARY RESTRAINING ORDER—January 27, 1960

Now on this day comes the plaintiff by his attorney and files and presents his complaint seeking to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission in which they seek a temporary restraining order and an interlocutory injunction; and the court having read said complaint and having heard the statement of counsel finds that good cause exists for issuing a temporary restraining order against said defendants as

prayed; that if the orders of the Interstate Commerce Commission dated June 30, 1959, December 16, 1959, and January 22, 1960, in Docket MC-117391 are allowed to become final and effective, the plaintiff will suffer irreparable damage.

Wherefore, it is ordered, adjudged and decreed:

That the defendants and each of them be and they are restrained and enjoined, until further order of the court from allowing the said orders to become final and effective and the effective date of said orders is hereby suspended until further order of the court; and the defendants are further ordered to show cause within the time permitted by law why the foregoing temporary restraining order should not be made an interlocutory injunction.

Dated at Fort Smith, Arkansas, this 27th day of January, 1960.

JNO. E. MILLER, United States District Judge

[File endorsement omitted]

[fol. 57]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

[Title omitted]

ANSWER OF L. A. TUCKER TRUCK LINES, INC. AND ORSCHELN  
BROS. TRUCK LINES, INC., INTERVENING DEFENDANTS  
—Filed March 11, 1960

Come now L. A. Tucker Truck Lines, Inc. and Orscheln Bros. Truck Lines, Inc., intervening defendants, and as their answer to the complaint respectfully say:

I

Intervening defendants admit the allegations contained in paragraph 1 of the complaint.

## II

Intervening defendants admit that the Interstate Commerce Commission granted to the plaintiff the temporary authorities referred to in paragraph 2 of the complaint, but said intervening defendants deny that there was an immediate and urgent need for such service for which no other carrier service was available, as alleged by plaintiff in paragraph 2 of the complaint.

## III

Intervening defendants admit the allegations contained in paragraphs 3 and 4 of plaintiff's complaint and state further that intervening defendants herein were parties protestant to the proceedings referred to in said paragraphs 3 and 4 of plaintiff's complaint; that said intervening defendants had filed timely notice of intent to protest said application of plaintiff, in accordance with the law and the rules and regulations established by the Interstate Commerce Commission.

## IV

Intervening defendants admit the allegations contained in paragraph 5 of plaintiff's complaint that the hearing examiner found that the plaintiff's application for permanent authority to operate as a contract carrier by motor vehicle, referred to in paragraph 3 of plaintiff's complaint, should be granted. However, said intervening defendants deny each and every other allegation contained in paragraph 5 of plaintiff's complaint insofar as such allegations relate to the testimony of witnesses and evidence of record in the hearing referred to in paragraph 5 of plaintiff's complaint.

## V

Intervening defendants admit the allegations contained in paragraph 6 of plaintiff's complaint.

## VI

With regard to paragraph 7 of plaintiff's complaint, intervening defendants admit that Division I of the Interstate Commerce Commission in a Report dated June 30, 1957 and

served July 7, 1959, adopted generally the statement of facts of the hearing examiner and concluded that the application should be denied in its entirety; that Exhibit D is a copy of the Report and Order of Division I of the Interstate Commerce Commission; that said Division I concluded that under the provision of Section 209(b) of the Interstate Commerce Act, as amended August 22, 1957, the applicant was required to show that existing service was not adequate to meet the needs of the shippers; that existing carriers would suffer adverse affect if the application were granted; that desire for a lower rate was not sufficient basis for the grant of authority to plaintiff.

Intervening defendants deny each and every other allegation contained in paragraph 7 of plaintiff's complaint.

## VII

Intervening defendants admit the allegations contained [fol. 59] in paragraph 8 of plaintiff's complaint.

## VIII

Intervening defendants deny each and every allegation contained in paragraphs 9, 10, 11 and 12 of plaintiff's complaint.

## IX

As a further defense, intervening defendants state that plaintiff, in support of his application for authority referred to in paragraph 3 of his complaint, presented evidence through supporting shipper witnesses that said witnesses supported the application in order to obtain lower freight rates; that such basis is not a proper ground for a grant of authority.

## X

As a further defense, intervening defendants state that Section 209(b) of the Interstate Commerce Act sets forth certain of the criteria to be considered in determining whether the issuance of a permit will be consistent with the public interest and the National Transportation Policy. Some of these criteria are: "The number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have



upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shippers and the changing character of that shipper's requirements"; that the Interstate Commerce Commission based its denial of plaintiff's said application on the fact that plaintiff had not shown that he would be adversely affected by a denial of the application; that intervention of a new carrier into a field of transportation would adversely affect existing carriers; that the service proposed by applicant was in no way different than that of existing carriers; that there was no showing that the nature of the supporting shippers' needs were such as to change and render existing service unsatisfactory; that there was no erroneous application or interpretation of Section 209(b) [fol. 60] of the Interstate Commerce Act by the Commission; that the interpretation of law by the Commission was proper; and that the law and the evidence of record required a denial of plaintiff's said application.

## XI

As a further defense, intervening defendants state that the Interstate Commerce Commission's decision in the said application filed by plaintiff was based on the fact that the shipper witnesses had not used existing carriers' services and therefore could not determine whether or not such service was inadequate; that there was no showing that the proposed service would be consistent with public interest or the National Transportation Policy.

Intervening defendants herein state that the action of the Interstate Commerce Commission in denying plaintiff's said application was in accordance with the law and was based on substantial evidence in the record considered as a whole; that desire of shippers for a lower rate is not basis for a grant of authority.

## XII

As a further defense, intervening defendants state that there has been no showing that the service which plaintiff seeks to render would be consistent with the public interest and the National Transportation Policy. The existing carriers serving the area proposed to be served by plaintiff are capable of rendering adequate service. There has been

no evidence of record of any inadequacy of existing service. Plaintiff has failed to make the necessary proof required of him by Section 309 of the Interstate Commerce Act, as amended.

Wherefore, intervening defendants pray that the relief [fol. 61] sought by the plaintiff be denied and that the complaint be dismissed.

Respectfully submitted,

La Tourette & Rebnan, By G. F. Gunn, Jr., Suite  
1230 Boatmen's Bank Bldg., St. Louis 2, Missouri;  
Harper, Harper, Young & Durden, By J. W. Dur-  
den, P. O. Box 297, Ft. Smith, Arkansas, Attorneys  
for L. A. Tucker Truck Lines, Inc. and Orscheln  
Bros. Truck Lines, Inc., Intervening Defendants  
herein.

[fol. 62]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—  
Filed March 28, 1960

The Interstate Commerce Commission, a defendant herein, answers the complaint as follows:

I.

Admits the allegations contained in paragraphs 1, 3, 4, 6 and 8.

II.

Admits only the allegations contained in paragraph 2 that the Commission granted to plaintiff the temporary operating authorities specified in Exhibits A and B attached to the complaint.



### III.

Admits the allegations contained in paragraph 5 but refers to the recommended report and order of the examiner for a true, complete, and accurate statement of their contents.

[fol. 63]

### IV.

Admits the allegations contained in paragraph 7 but refers to the report and order of the Commission for a true, complete, and accurate statement of their contents.

### V.

Denies the allegations contained in paragraphs 9, 10, 11 and 12.

### VI.

For further answer to the allegations of the complaint, defendant denies that the action of the Commission challenged herein is unlawful for the reasons specified in the complaint, or for any other reason whatsoever. Defendant avers that the action of the Commission is fully supported and justified by the record, and that in taking such action the Commission carefully considered and weighed in light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to the proceeding by their respective counsel, and that said action is not arbitrary, capricious, unjust or contrary to law.

Except as herein expressly admitted, defendant denies each and every allegation contained in the complaint.

Wherefore, defendant prays that the relief sought in the complaint be denied, and that the complaint be dismissed with costs.

Robert W. Ginnane, General Counsel, Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Robert W. Ginnane, General Counsel.

[fol. 64] Certificate of Service (omitted in printing).

[fol. 66] [File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

[Title omitted]

**ANSWER OF ARKANSAS-BEST FREIGHT SYSTEM, INC., EAST  
TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR  
TRANSPORT, INC., WESTERN TRUCK LINES, LTD., AND  
REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN  
TRUCKING ASSOCIATIONS, INC., INTERVENING DEFENDANTS  
—Filed March 28, 1900**

Come now Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and Regular Common Carrier Conference of the American Trucking Associations, Inc., intervening defendants, and as their answer to the complaint respectfully say:

**I**

Intervening defendants admit the allegation contained in Paragraph 1 of the Complaint.

**II**

Intervening defendants admit the allegations contained in Paragraph 2 of the Complaint, except to the extent that said allegations might infer that there was in fact an immediate and urgent need for service which could not be performed except through the granting of temporary authority to E. L. Beddish.

**III**

Intervening defendants admit the allegations contained in Paragraph 3.

**IV.**

Intervening defendants admit the allegations contained in Paragraph 4, and state further that all of them with the exception of Common Carrier Conference of the American Trucking Associations, Inc., were actual protestants, rather than intervenors.

[fol. 67]

**V.**

The intervening defendants admit that a hearing examiner of the Interstate Commerce Commission issued a written report in Docket No. MC-117391 but aver that the Recommended Report and Order itself is the best statement of what that order actually contains.

**VI.**

Intervening defendants admit that exceptions were filed by protestants, including all of these intervening defendants with the exception of the Regular Common Carrier Conference of the American Trucking Associations, Inc.

**VII.**

Intervening defendants admit the allegations contained in Paragraph 7 but aver that the Report and Order of the Commission is the best statement of the findings and conclusions of Division 1 of the Commission in Docket No. MC-117391.

**VIII.**

Intervening defendants admit the allegations contained in paragraph 8 of the Complaint.

**IX.**

Intervening defendants deny the allegations contained in Paragraphs 9, 10, 11 and 12 of the Complaint.

**X.**

For further answer to the allegations of the Complaint, intervening defendants deny that the action of the Inter-

state Commerce Commission challenged herein is unlawful in any respect. Intervening defendants aver that the action of the Commission was in accordance with authority delegated to it by Congress through the Interstate Commerce Act and that the orders issued by the Commission are fully and completely supported by substantial evidence of record.

Intervening defendants further aver that the action of the Commission was in no respect arbitrary, capricious, unjust or contrary to law.

Except as herein expressly admitted, intervening defendants deny each and every allegation contained in the Complaint.

[fol. 68] Wherefore, intervening defendants pray that the relief sought by the plaintiff be denied and that the Complaint be dismissed with costs.

Respectfully submitted,

Rice, Carpenter & Carraway, By: Roland Rice, Suite 618 Perpetual Building, 1111 E Street, N.W., Washington 4, D. C.; Callaway, Reed, Kidwell & Brooks, By Rollo E. Kidwell; Hugh T. Matthews, 305 Empire Bank Building, Dallas 1, Texas; Harper, Harper, Young & Durden, By J. W. Durden, Kelly Building, P. O. Box 297, Ft. Smith, Arkansas.

Certificate of Service (omitted in printing).

[fol. 69] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

[Title omitted]

ANSWER OF THE UNITED STATES—Filed April 4, 1960

Comes now the defendant United States of America and for its answer to the complaint admits each and every allegation thereof.

Robert A. Bicks, Acting Assistant Attorney General.

Richard H. Stern, Attorney, Department of Justice.

Charles W. Atkinson, United States Attorney, By Robert E. Johnson, Assistant.

Certificate of Service (omitted in printing).

[fol. 71] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

[Title omitted]

ANSWER OF CLASS 1 RAIL CARRIERS IN WESTERN TRUNK  
LINE TERRITORY—Filed April 15, 1960

Now come Class 1 Rail Carriers in Western Trunk Line Territory, as intervening defendants, and for the purpose of their answer to the plaintiff's complaint state and allege:

I

The allegations and averments contained in paragraphs numbered 9, 10, 11 and 12 of plaintiff's complaint are admitted.

## II

The allegations and averments contained in paragraphs numbered 9, 10, 11 and 12 of plaintiff's complaint are denied.

## III

The allegations and averments contained in paragraph numbered 2 of plaintiff's complaint are admitted only insofar as such allegations pertain to the issuance to the plaintiff, by the Interstate Commerce Commission, of a temporary operating authority to transport as a contract carrier and are denied as to the allegation that such temporary authority was for the purpose of providing transportation for which there was an immediate and urgent need and for which there was no other carrier service available.

## IV

For further answer to the allegations of the complaint, [fol. 72] defendants deny that the action of the Interstate Commerce Commission challenged herein is unlawful for the reasons specified in the complaint, or for any other reason whatsoever. Defendants aver that the action of the Interstate Commerce Commission is fully supported and justified by the record, and that in taking such action the Commission carefully considered and weighed in light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to the proceeding by their respective counsel, and that said action is not arbitrary, capricious, unjust or contrary to law.

Except as herein expressly admitted, defendants deny each and every allegation contained in the complaint.

Wherefore, intervening defendants, Class 1 Rail Carriers in Western Trunk Line Territory, pray that plaintiff's, Elvin L. Reddish's, complaint be dismissed and that

the defendants herein be given judgment for the costs expended and other just and legal relief.

E. L. Ryan, Jr., Chicago, Rock Island & Pacific Railroad Company, LaSalle Street Station, 139 West Van Buren Street, Chicago 5, Illinois; Warner, Warner & Ragon, By Heartsill Ragon, Suite 522, Merchants National Bank Building, Fort Smith, Arkansas, Attorneys for Intervening Defendants, Class 1 Rail Carriers in Western Trunk Line Territory.

Certificate of Service (omitted in printing).

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[fol. 75]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION  
Civil Action No. 1531

---

ELVIN L. REDDISH, Plaintiff,  
CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING  
ASSOCIATIONS, Inc., Intervening Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE  
COMMERCE COMMISSION, Defendants.

---

COMPLAINT OF CONTRACT CARRIER CONFERENCE OF AMERICAN  
TRUCKING ASSOCIATIONS, Inc.—Filed April 15, 1960

I

Intervening plaintiff, Contract Carrier Conference of American Trucking Associations, Inc. (herein referred to as the Conference) is a non-profit corporation organized and existing under the laws of the State of Delaware with

its principal offices at 1424 Sixteenth Street, N.W., Washington, D. C. Its members hold permits from the Interstate Commerce Commission authorizing the transportation, as contract carriers, by motor vehicle, of a wide variety of commodities in interstate or foreign commerce.

## II

This is an action to vacate, enjoin, annul, and set aside orders of the Interstate Commerce Commission (herein referred to as the Commission) dated June 30, 1959, and December 16, 1959, issued in a proceeding before the Commission in its Docket No. MC-117391, entitled *E. L. Reddish Contract Carrier Application*.

## III

The Court has jurisdiction of this action under Title 49, Sections 17, 305(g) and 305(h) of the United States Code; and under Title 28, Sections 1336, 1398, 2284, and 2321-2325, and Title 5, Section 1009 of the United States Code. The United States of America is named as a statutory defendant pursuant to Title 28, Section 2322 of the United States Code.

[fol. 76]

## IV

E. L. Reddish, herein referred to as Reddish, initially obtained temporary authority from the Commission, pursuant to Section 210a (a) of the Interstate Commerce Act, 49 U.S.C. 310a (a) to operate as a contract carrier by motor vehicle, in interstate or foreign commerce, transporting canned goods for the Steele Canning Company from Springdale, Lowell and Ft. Smith, Arkansas and Westville, Oklahoma, to points in a number of states. Subsequently, Reddish was granted temporary authority to transport new tin cans and lids for the account of Steele Canning Company from Norwood and Sharonville, Ohio and Elwood, Ind. to Springdale and Lowell, Ark. Copies of the temporary authorities issued were filed with the complaint of Reddish as Exhibits A and B.



## V

By an application filed May 13, 1958, pursuant to the provisions of Section 209 (b) of the Interstate Commerce Act, 49 U. S. C. 309 (b), Reddish requested permanent authority to operate, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, transporting (1) canned goods from Springdale, Lowell, and Ft. Smith, Ark., and Westville, Okla., to points in a number of states, and (2) canned goods, and material and supplies used in the manufacture of canned goods in return movements to the above-named destinations; the proposed service in each case to be limited to transportation performed under continuing contracts with Steele Canning Company, of Springdale, Ark., Keystone Packing Company of Ft. Smith, Ark., and Cain Canning Company, Inc., of Springdale, Ark.

The application was referred to Hearing Examiner H. L. Hanback and hearings were held June 23, 1958 and October 20, 1958 at Kansas City, Mo. A number of railroads and motor common carriers opposed the application.

## VI

By a report and recommended order served January 2, 1959, the Examiner found that the authority sought should be granted in substance, that to the extent set forth in the report, the proposed operations of applicant should be consistent with the public interest and the national transportation policy; that applicant was fit, willing and able to properly perform such service; and that a permit authorizing such operations should be granted to the extent indicated. A copy of the Examiner's report and recommended order was filed with the complaint of Reddish as Exhibit C.

[fol. 77]

## VII

Joint and separate exceptions were filed by certain protestants to the order recommended by the Examiner, and applicant, Reddish, replied thereto. Thereafter, the Commission, Division 1, entered its report and order of June 30, 1959, wherein it overruled the Examiner and denied

applicant's requested authority in its entirety. A copy of this report and order was filed with the complaint of Reddish as Exhibit D.

### VIII

On August 17, 1959 the Conference filed a petition for leave to intervene in the proceeding before the Commission and simultaneously therewith filed a petition for reconsideration of the report and order of Division 1. A copy of each of these documents is attached hereto, and made a part hereof, marked as Appendices A and B respectively. Applicant also filed a petition for reconsideration and for oral argument. Protestants and another intervener replied to these petitions. By an order dated December 16, 1959, the Commission permitted intervention by this Conference and also by the Regular Common Carrier Conference of American Trucking Associations. By this same order, however, all petitions for reconsideration or for oral argument were denied. A copy of this order was filed with the complaint of Reddish as Exhibit E. Plaintiff and intervening plaintiff have therefore exhausted their administrative remedies.

### IX

The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 are erroneous and void as a matter of law for the reason that the Interstate Commerce Commission has failed to apply the standards set out in section 209 (b) of the Interstate Commerce Act as amended August 22, 1957, 49 U.S.C. 309 (b), to the application of plaintiff for authority to operate as a contract carrier.

### X

The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 are erroneous and void as a matter of law for the reason that the Interstate Commerce Commission denied the application under an erroneous application and interpretation of section 209 (b) of the Interstate

Commerce Act as amended August 22, 1957, 49 U.S.C. 309 (b).

[fol. 78]

## XI

The Orders of the Interstate Commerce Commission dated June 30, 1959, and December 16, 1959, are erroneous and void as a matter of law for the reason that the Interstate Commerce Commission refused to consider relevant evidence in an application proceeding under section 209 (b) of the Interstate Commerce Act as amended August 22, 1957, 49 U.S.C. 309 (b).

## XII

The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 are erroneous and void as a matter of law for the reason that they are arbitrary and capricious and without foundation in substantial evidence in the record considered as a whole.

Wherefore, the Conference prays that the Court suspend, enjoin, annul and set aside the Orders of the Commission dated June 30, 1959 and December 16, 1959, and that the Conference have such other and further relief in the premises to which it may be entitled and as may be deemed by the Court to be just and proper.

Contract Carrier Conference of American Trucking Associations, Inc.; Clarence D. Todd, 1825 Jefferson Place, N.W., Washington 6, D. C., Attorney for Intervening Plaintiff; John H. Joyce, 26 North College, Fayetteville, Ark., Attorney for Intervening Plaintiff.

Todd, Dillon & Singer, Of Counsel, 1825 Jefferson Place, N.W., Washington 6, D. C. and 33 North La Salle Street, Chicago 2, Illinois.

[fol. 79] Certificate of Service (omitted in printing).

[fol. A] [File endorsement omitted]

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION  
Washington 25, D. C.

SECRETARY'S CERTIFICATE

I, Harold D. McCoy, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Application filed May 14, 1958 on Form BMC 78,  
Order of the Commission, entered June 6, 1958,

Transcript of the stenographer's notes of hearing held  
July 23, October 20 and October 21, 1958, at Kansas  
City, Missouri,

Report and order recommended by H. L. Hanback,  
Hearing Examiner, served January 2, 1959,

Exceptions of Wright Motor Lines, Inc., et al., filed  
February 2, 1959,

Exceptions of Rail Protestants, filed February 2, 1959,

Exceptions of Arkansas-Best Freight System, Inc.,  
et al., filed February 2, 1959

Exceptions of Watson Bros. Transportation Co., Inc.,  
filed February 2, 1959,

Reply of Applicant, filed February 25, 1959,

Report and order of the Commission, filed and en-  
tered June 30, 1959,

Petition of Applicant for Reconsideration and Oral  
Argument, filed August 14, 1959,

Petition of Contract Carrier Conference for Recon-  
sideration, filed August 17, 1959,

Petition of Contract Carrier Conference for Leave to  
Intervene, filed August 17, 1959,

Reply of Watson Bros. Transportation Co., Inc., filed  
September 4, 1959,

Reply of Wright Motor Lines, Inc., et al., filed September 8, 1959,

Reply of Rail Protestants, filed September 14, 1959,

Reply of Arkansas-Best Freight System, Inc., et al., filed September 17, 1959,

[fol. B] Reply of Regular Common Carrier Conference, filed September 18, 1959

Petition of Regular Common Carrier Conference for Leave to Intervene, filed September 18, 1959,

Reply of L. A. Tucker Truck Lines, Inc., filed September 23, 1959, and

Order of the Commission, entered December 16, 1959, in Docket No. MC-117391, E. L. Reddish Contract Carrier Application, Springdale, Arkansas, the originals of which are now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 2nd day of March, A. D. 1960.

(Seal)

Harold D. McCoy, Secretary of the Interstate Commerce Commission.

[fol. C]

BEFORE THE INTERSTATE COMMERCE COMMISSION

APPLICATION FOR MOTOR CARRIER CERTIFICATE OR PERMIT—  
Filed May 14, 1958

(Read instructions on page 4 [fol. F] hereof  
before answering)

Before the Interstate Commerce Commission

I. Application of E. L. Reddish, an individual  
(Name) (Trade name)

(State whether an individual, partnership, corporation, association, fiduciary, or other legal entity. If a partnership, give names of all partners. Give name of State in which incorporated, if a corporation, and the names and addresses of all directors and officers, if a corporation or association.)

whose business address is 711 Shipley Street, Springdale,  
(Street) (City)

Arkansas  
(State)

II. Appropriate authority is applied for to: ...continue an operation instituted on .....; X institute a new operation; ...extend an existing operating; ...change an operation; ...engage in dual operations (place X in appropriate space to indicate applicable phrase or phrases. If authority is sought to continue an operation, attach an abstract from applicant's records to show actual shipments on and after the date the operation was instituted. If traffic was interchanged, give only the points at which applicant effected such interchange. Such abstract should show: Date, origin point, destination point, and commodity), as a contract carrier by motor vehicle, in  
 (Common or contract)  
 interstate or foreign commerce, over irregular routes,  
 (Regular or irregular)  
 in the transportation of (see Appendix E attached)

.....  
 (If general commodities, so state, and name exceptions, if any; if specific commodities, name them; if passengers, so state and indicate if it is desired to transport express, mail, newspapers, and/or baggage of passengers in the same vehicle with passengers, and whether it is desired to transport baggage of passengers in separate vehicles.)

from (see Appendix E attached) to ....., or  
 between ..... and ....., as  
 follows: .....

(Give detailed description of routes or territories)

III. It is proposed to serve the following intermediate and/or off-route points:

none

(Intermediate points applies only to regular-route operations)

(Off-route points applies only to regular-route operations of property carriers)

[fol. D]

PAGE 2

IV. On return trips applicant proposes to: ....transport only empty containers or other such incidental facilities used in transporting the commodities specified in this application; ....furnish no transportation for compensation; X transport other commodities, namely: (see Appendix E attached)

V. The proposed operation will be: X year-round or .....seasonal between ..... and .....  
 (Day and month) ..... approximately ..... times  
 (Day and month) ..... (Number) .....  
 each .....; ....on schedule, ....not  
 (Day, week, month, or year) .....  
 on schedule, ....on call.

VI. Applicant proposes to use approximately nine  
 (Number) .....  
 motor vehicles in the proposed service described above, of the kind and type described in appendix "A" hereto attached.

VII. A financial statement, showing in detail applicant's current financial condition, is attached hereto as appendix "B."

VIII. The extent, if any, to which applicant is directly or indirectly affiliated with, controlled by, or under common control or management with any other carrier subject to the Interstate Commerce Act, is as follows:

not applicable

(If not applicable, so state. If applicable, give complete details)



IX. A map of the proposed operation, showing also the pertinent portions of applicant's present authority, if any, is attached as appendix "C."

X. Previous application(s) under Part II, Interstate Commerce Act, is (are) filed under Docket No(s). MC none

XI. The complete authority, if any, heretofore issued to applicant by the Commission, both as to traffic and routes or territory involved, is reflected by appendix "D" hereto. If none, so state none

XII. Authority to engage in intrastate commerce over ....the whole or ....part of the route or over the X whole or ....part of the area: ....has been granted to applicant by the State Board(s); ....is the subject of pending application(s) before the State Board(s); or X will be the subject of application(s) to the State Board(s).

XIII. If the Commission assigns this application for formal hearing applicant requests that the hearing be held at Little Rock, Arkansas  
(City and State)

XIV. Applicant will introduce approximately 4 witnesses at the hearing, and will require approximately 3 hours to present evidence.  
(Number)  
(Number)

[fol. E]

PAGE 3

XV. Applicant understands that the filing of this application does not, in itself, constitute authority to operate.

### OATH

County of Washington,  
State of District of Columbia, ss:

E. L. Reddish, being duly sworn, states that he files  
(Name of affiant)  
this application as (indicate relationship to applicant, that is, owner or proprietor, title as officer of applicant corporation or association, member of applicant partnership, or other authorized representative of applicant) propri-



etor; that, in such capacity, he is qualified and authorized to file and verify such application; that he has carefully examined all the statements and matters contained in the application; and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief. Affiant further states that the application is made in good faith, with the intention of presenting evidence in support thereof in every particular, and that he has made diligent inquiries to determine the names of all competitors as required in the following certificate of service.

s/ E. L. REDDISH  
(Signature of affiant)

Subscribed and sworn to before me, a Notary Public in District of Columbia, City of Wash., this 12 day of May, 1958

[SEAL]

s/ JOYCE B. STOEHR

My commission expires June 14, 1962

### CERTIFICATE OF SERVICE

A copy of this application has been delivered, in person or by registered or receipted mail, to each of the following State Boards or officials, including each State in or through which it is proposed to operate:

*Name of State Board*

*Address*

(see attached Exhibit F)

.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

A notice of the filing of this application, Form BMC 15 (Revised), has been delivered, in person or by registered or receipted mail, to the following carriers by motor ve-

hicle, rail, or water, known to the applicant, with whose service the operations described in this application are or will be directly competitive (applicant should make diligent inquiries, including, among other places, the appropriate field offices of the Commission's Bureau of Motor Carriers, to determine the name of every motor carrier, railroad, or water carrier with whose service the operations described in this application are or will be competitive):

*Name of Competitor*

*Address*

.....	.....
.....	.....
.....	.....
.....	.....

Date May 13, 1958

Signed A. ALVIS LAYNE

[fol. F]

PAGE 4

### INSTRUCTIONS

1. The application should be carefully and completely filled out by typewriter, but if made out in neat handwriting, in ink, it will be accepted; if made out in pencil it will be rejected. The entire application may be printed or mimeographed if the prescribed form is followed in all particulars, including dimensions of the paper.

2. The original application, properly signed and sworn to before a notary public, must be mailed to the Interstate Commerce Commission, Washington 25, D. C., and one true copy thereof, which need not be notarized, must be furnished the District Director or Supervisor located in the district wherein applicant is domiciled. Copies shall be furnished to others as specified in the "Certificate of Service" in the application. After the filing of the application the applicant will be notified by the Commission of all subsequent proceedings therein.

3. If the space provided in the form is insufficient, use plain white paper, of the same dimensions as the form, to complete answer. When answer is carried forward, write in the blank space "See attached sheet 1 (or 2, 3, 4, etc.), Item I (or II, III, IV, etc.)." Number attached sheets consecutively from "1" and state thereon "Item I (or II, III, IV, etc.), continued from page 1 (or 2, 3, etc.)." Unless the appendices and other required information are submitted with the application it will not be accepted.

4. The applicant should list competitors in the spaces provided at the end of the application form, and should retain the receipts from the Post Office Department for the notices, Form BMC 15 (Revised), mailed to the competitors. These receipts may be obtained under the following Post Office regulations:

"Upon request and payment of 1 cent for each piece of ordinary mail of any class, the sender will be furnished a receipt or Certificate of Mailing. This fee carries with it no insurance or indemnity and no return receipt is obtained from the addressee." (Rule 66.)

5. Assistance in the preparation of an application may be had from one of the District Supervisors of the Bureau of Motor Carriers. Before requesting assistance, however, applicant should prepare a rough draft copy of the application and appendices to be used as a basis for the District Supervisor's suggestions. In view of the fact that the District Supervisor's duties frequently call him away from his office, interviews for this purpose should be arranged in advance.

[fol. G]

**EXHIBIT A TO APPLICATION****EQUIPMENT LIST****E. L. REDDISH****Springdale, Arkansas****TRACTORS:**

Unit No.	Make	Year	Serial No.	Motor No.	License No.
1	White Diesel	1956	468813	168210	D7-076
2	White Diesel	1957	471684	174988	D7-075
3	White	1956	451071	29393	D7-074
4	White Diesel	1956	468809	168308	D7-073
5	White Diesel	1957	471687	174975	D7-072
6	White	1955	443897	24143	D7-071
7	White	1954	436738	19527	D7-070
8	White	1954	436379	19516	D6-612
9	White	1956	451070	29420	D7-069

**TRAILERS:**



Unit No.	Make	Year	Serial No.	License No.
1	Dorsey	1957	32502	ST-38-668
2	Andrews	1954	1280	ST38-667
3	Gramm	1951	432575029	ST38-666
4	Andrews	1954	1294	ST38-665
5	Andrews	1954	1235	ST38-661
6	Andrews	1955	1385	ST38-664
7	Andrews	1955	1499	ST38-663
8	Andrews	1954	1382	ST38-221
9	Dorsey	1955	26807	ST38-662



[fol. H]

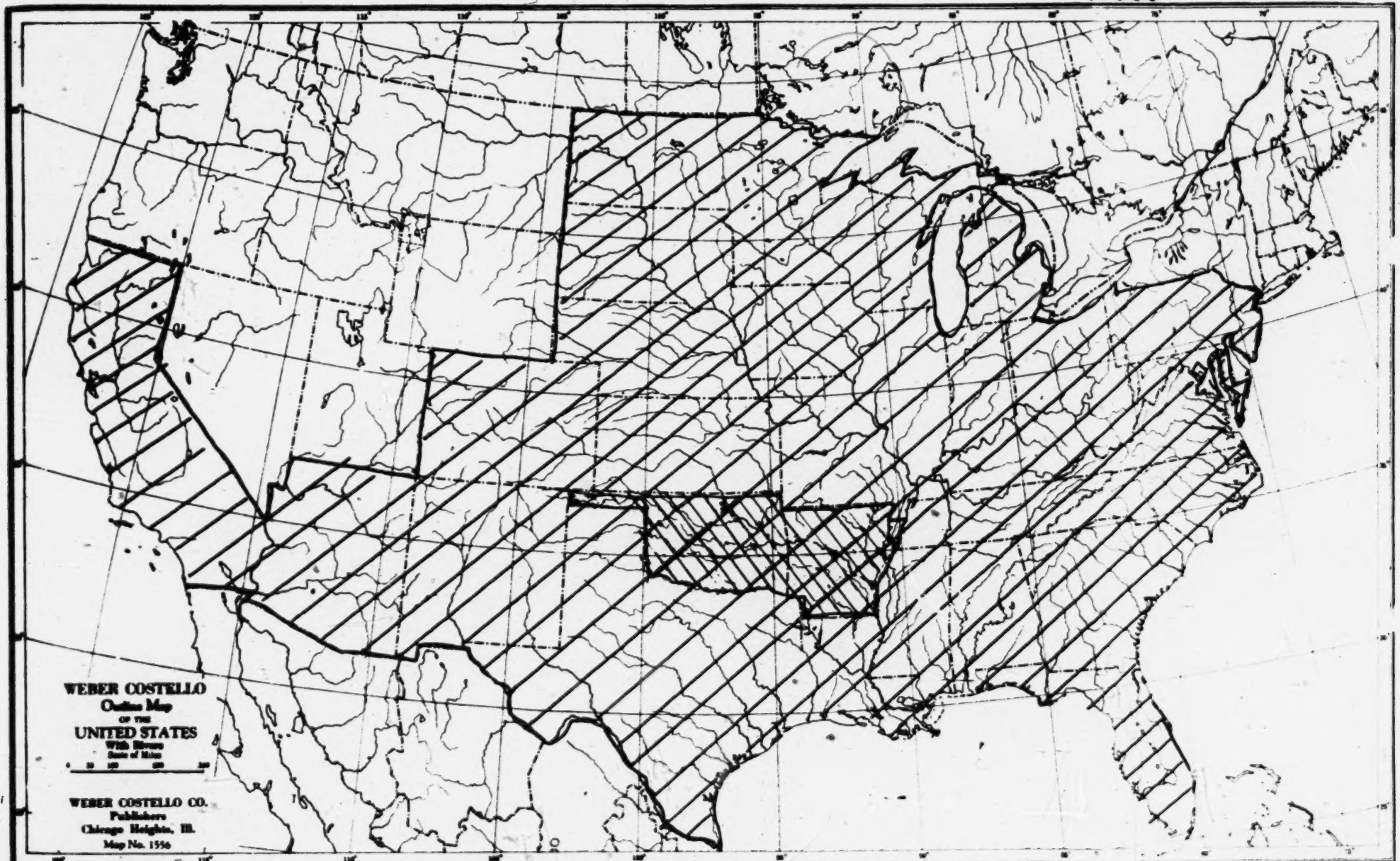
**EXHIBIT B TO APPLICATION**  
**FINANCIAL STATEMENT**  
**March 31, 1958**

**E. L. REDDISH**  
**Springdale, Arkansas**

<b>ASSETS</b>		<b>LIABILITIES</b>	
Cash on Hand & Bank	\$ 32,365.16	Accounts Payable	\$ 4,437.79
Accounts Receivable	398.88	Note Payable, Bank	1,233.60
Building, Less Depr.	9,285.14	Note Payable, Long Term: White Truck	9,223.50
Shop Equipment, Less Depreciation	1,097.25	C.I.T.	7,360.64
Trucks, Less Depreciation	35,689.55	Accruals: W.H. & S.S. Tax	81.49
Trailers, Less Depreciation	19,913.61	Surplus	90,403.79
Office Furn., Less Depreciation	1,183.64		
Car, Less Depreciation	2,508.98		
Aircraft, Less Depreciation	3,666.68		
Aircraft Hangar, Less Depreciation	350.74		
Prepaid Expense	6,286.18		
	<hr/>		<hr/>
	<b>\$112,740.81</b>		<b>\$112,740.81</b>

**CANNED GOODS** From:  To: 

**CANNED GOODS AND MATERIALS AND SUPPLIES  
USED IN MANUFACTURE OF CANNED GOODS** From:  To: 



**WEBER COSTELLO**  
Outline Map  
OF THE  
**UNITED STATES**  
With Rivers  
Scale of Miles  
0 100 200

**WEBER COSTELLO CO.**  
Publishers  
Chicago Heights, Ill.  
Map No. 1556



[fol. J]

**EXHIBIT E TO APPLICATION**

Applicant seeks authority to operate as a contract carrier over irregular routes in the transportation of:

**Canned Goods**

From points in Arkansas and Oklahoma to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

**Canned Goods and materials and supplies**

used in the manufacture of canned goods from the above-specified destination points to the described origin points.

The operations to be authorized are to be limited to a transportation service to be performed, under a continuing contract, for the following companies:

**Steele Canning Company, Springdale, Arkansas**  
**Keystone Packing Company, Fort Smith, Arkansas**  
**Cain Canning Company, Inc., Springdale, Arkansas**

[fol. K]

**EXHIBIT F TO APPLICATION**

A copy of this application has been served, by registered mail, to each of the following State Boards or officials, including each State in or through which it is proposed to operate:

Name of State Board	Address
Alabama Public Service Commission	Montgomery 2, Alabama
Arizona Corporation Commission	Phoenix, Arizona
Arkansas Commerce Commission	Little Rock, Arkansas
California Public Utilities Commission	California State Bldg. Civic Center San Francisco 2, California
Colorado Public Utilities Commission	State Office Bldg. Denver 2, Colorado
Florida Railroad and Public Utilities Commission	Tallahassee, Florida
Georgia Public Service Commission	Atlanta, Georgia
Illinois Commerce Commission	Springfield, Illinois
Indiana Public Service Commission	401 State House Indianapolis 4, Indiana
Iowa State Commerce Commission	State Capitol Des Moines 19, Iowa
Kansas State Corporation Commission	Topeka, Kansas
Kentucky Department of Motor Transportation	Frankfort, Kentucky
Louisiana Public Service Commission	Baton Rouge 4, Louisiana
Maryland Public Service Commission	Munsey Bldg. Baltimore, Md.
Michigan Public Service Commission	State Office Bldg. Lansing 13, Michigan
Minnesota Railroad and Warehouse Commission	State Office Bldg. St. Paul 1, Minnesota
Mississippi Public Service Commission	Jackson 44, Mississippi
Missouri Public Service Commission	Public Service Commission Bldg. Jefferson City, Missouri



Name of State Board	Address
Nebraska State Railway Commission	State Capitol Lincoln 9, Nebraska
New Jersey Board of Public Utility Commissioners	Trenton 7, New Jersey
New Mexico State Corporation Commission	Santa Fe, New Mexico
North Carolina Utilities Commission	Raleigh, North Carolina
North Dakota Public Service Commission	Bismark, North Dakota
[fol. L]	
Ohio Public Utilities Commission	Columbus 15, Ohio
Oklahoma Corporation Commission	Oklahoma City 5, Oklahoma
Pennsylvania Public Utility Commission	Harrisburg, Pa.
South Carolina Public Service Commission	Columbia 1, South Carolina
South Dakota Public Utilities Commission	Pierre, South Dakota
Tennessee Public Service Commission	Nashville 3, Tennessee
Texas Railroad Commission	Austin 11, Texas
Virginia State Corporation Commission	Richmond 9, Virginia
West Virginia Public Service Commission	Charleston, West Virginia
Wisconsin Public Service Commission	Madison 2, Wisconsin

Bureau of Motor Carriers	Address
District Supervisor District No. 6 Interstate Commerce Commission	Room 137, Post Office & Court House Building Little Rock, Arkansas
District Director District No. 12 Interstate Commerce Commission	816 T & P Building Fort Worth 2, Texas

[fol. 1]

**BEFORE THE INTERSTATE COMMERCE COMMISSION**

**Docket No. MC-117391**

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**In the Matter of :**

**Application of E. L. REDDISH**

**711 Shipley Street,  
Springdale, Arkansas.**

---

**Transcript of Hearing of July 23, 1958**

**Windsor Room,  
Pickwick Hotel,  
Kansas City, Missouri.**

**Met, pursuant to notice, at 9:30 a.m.**

**BEFORE :**

**H. L. Hanback, Examiner**

**APPEARANCES :**

**John H. Joyce, 26 North College, Fayetteville, Arkansas,  
appearing for applicant.**

**A. Alvis Layne, Pennsylvania Building, Washington 4,  
D.C., appearing for applicant.**

**John C. Ashton, 906 Olive Street, St. Louis 1, Missouri,  
appearing for Frisco Transportation Company, protestant.**

**Edward G. Bazelon, 39 South LaSalle Street, Chicago,  
Illinois, appearing for Watson Bros. Transportation Com-  
pany, Central Wisconsin Motor Transport Company, pro-  
testants.**

**Carll V. Kretsinger, 1014 Temple Building, Kansas City,  
Missouri, appearing for The Chief Freight Lines Company,  
Campbell "66" Express, Inc., Churchill Truck Lines, Inc.,  
protestants.**

**[fol. 2] J. Max Harding, 605 South Twelfth Street,  
Lincoln, Nebraska, appearing for Howard J. and James  
Melvin Nelson doing business as Nelson Bros., protestant.**

**Hugh T. Matthews**, 305 Empire Bank Building, Dallas, Texas, appearing for East Texas Motor Freight Lines, Inc., Herrin Transportation Company, Western Trunk Lines, Limited, Gillette Motor Transport, protestants.

**E. L. Ryan, Jr.**, Room 1025, 139 West Van Buren, Chicago 5, Illinois, appearing for Class I Rail Carriers in Western Trunk Line Territory and Southwest Railroad Association, protestants.

**J. W. Durden**, Kelley Building, Ft. Smith, Arkansas, appearing for Arkansas-Best Freight System, Inc., protestant.

**Roy L. Eyster**, 7400 North Broadway, St. Louis 15, Missouri, Be-Mac Transport Company, Inc., protestant.

**Jerry Prestridge**, Century Life Building, Fort Worth 2, Texas, appearing for Red Arrow Freight Lines, Inc., Merchants' Fast Motor Lines, Inc., protestants.

**Marion F. Jones**, 526 Denham Building, Denver 2, Colorado, appearing for Wright Motor Lines, Loving Truck Lines, Buckingham Transportation, Buckingham Express, Buckingham Transfer, Buckingham Transportation, Inc., as operator of Des Moines Transportation Company, protestants.

**Gerald A. Orscheln**, 339 North Williams Street, Moberly, Missouri, appearing for Orscheln Bros. Truck Lines, Inc., protestant.

**Vernon M. Masters**, 1400 Kansas Avenue, Kansas City [fol. 3] 5, Kansas, appearing for Southwest Freight Lines, Inc., and Freightways, Inc., protestants.

**Thomas D. Boone**, 1505 Maiden Lane, Joplin, Missouri, appearing for Missouri-Arkansas Transport Company, protestant.

**G. F. Gunn, Jr.**, 314 North Broadway, St. Louis 2, Missouri, appearing for L. A. Tucker Truck Lines, protestant.

[fol. 5]

## PROCEEDINGS

**Exam. Hanback:** Come to order, please.

No smoking is permitted in the hearing room.

The Interstate Commerce Commission has set for hearing at this time and place Docket No. MC-117391, in the matter of the application of E. L. Reddish of Springdale,

Arkansas, for authority to operate as a contract carrier, by motor vehicle, over irregular routes, transporting: canned goods, as more fully described in the application, from points in Arkansas and Oklahoma to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin; and canned goods, and materials and supplies, used in the manufacture of canned goods, such as salt, sugar, metal cans and lids, cardboard boxes, printed labels, fresh vegetables, and fresh fruits, from the above-specified destination points or from the described destination territory, to the described origin points.

Applicant states that the operations to be authorized are to be limited to a transportation service to be performed, under a continuing contract, for the following companies: Steele Canning Company, Springdale, Arkansas; Keystone [fol. 6] Packing Company, Fort Smith, Arkansas; and Cain Canning Company, Inc., Springdale, Arkansas.

Who appears for the applicant?

Mr. Layne: A. Alvis Layne, Pennsylvania Building, Washington 4, D.C.

I am an attorney and admitted to practice.

I appear for the applicant in conjunction with Mr. John H. Joyce of 26 North College Street, Fayetteville, Arkansas. Mr. Joyce is present in the hearing room. Mr. Joyce is an attorney and admitted to practice before the Commission.

Exam. Hanback: As to the protestants, I would like to have them state, when they make their appearances, whether they have filed written notice of protest or intention to appear at the hearing within the prescribed time under the rules of practice.

Who appears for the protestants?

Mr. Ashton: My name is John C. Ashton, 906 Olive Street, St. Louis 1, Missouri.

I am an attorney at law and admitted to practice before the Interstate Commerce Commission. I am appearing on behalf of the Frisco Transportation Company, protestant,

and a notice of intention to protest in this proceeding has been timely filed.

**Exam. Hanback:** Very well.

**Mr. Bazelon:** My name is Edward G. Bazelon, 39 South LaSalle Street, Chicago, Illinois.

I am an attorney and admitted to practice before the [fol. 7] Commission. I appear on behalf of the protestants Watson Bros. Transportation Company and Central Wisconsin Motor Transport Company, both of which have filed timely notice of intention to protest.

**Mr. Kretsinger:** Carl V. Kretsinger, 1018 Temple Building, Kansas City, Missouri. I am appearing on behalf of protestants, The Chief Freight Lines Company, Campbell's "66" Express, Inc., Churchill Truck Lines, Inc.

I am an attorney and admitted to practice before the Commission.

**Exam. Hanback:** Did you file a regular notice?

**Mr. Kretsinger:** I filed a notice of protest.

**Mr. Harding:** J. Max Harding, 605 South Twelfth Street, Lincoln, Nebraska, and I am appearing on behalf of Howard J. and James Melvin Nelson doing business as Nelson Bros., Nebraska City, Nebraska, as protestant.

Written notice was served upon the applicant.

I am an attorney and admitted to practice.

**Mr. Matthews:** I am Hugh T. Matthews, 305 Empire Bank Building, Dallas, Texas. I appear on behalf of protestants, East Texas Motor Freight Lines, Inc., Herrin Transportation Company, Western Trunk Lines, Limited, and Gillette Motor Transport, Inc.

Notice of intention to protest was filed for each of these carriers.

[fol. 8] I am an attorney and admitted to practice before the Commission.

**Mr. Ryan:** E. L. Ryan, Jr. I am an attorney and admitted to practice before the Commission. I am appearing on behalf of the Class I Rail Carriers in Western Trunk Line Territory and for the Southwest Railroad Association.

Notice of intent to protest was filed timely.

My address is 139 West Van Buren Street, Chicago 5, Illinois.

**Mr. Durden:** I am J. W. Durden, Kelley Building, Ft. Smith, Arkansas.

I am an attorney and licensed to practice before the Interstate Commerce Commission, and I am appearing in behalf of Arkansas-Best Freight System, Inc., protestant.

Protest was filed within the time prescribed.

Mr. Eyster: Roy L. Eyster, 7400 North Broadway, St. Louis, Missouri. I am appearing for Be-Mac Transport Company, Inc.

I am licensed to practice before the Commission and notice of protest was timely filed.

Mr. Prestridge: Mr. Prestridge, Century Life Building, Fort Worth 3, Texas.

I am an attorney at law and admitted to practice before the Commission. I am appearing in this proceeding on behalf of Merchants Fast Motor Lines, Inc., and Red Arrow Freight Lines, Inc., protestants.

Notice of intention to protest was timely filed with the applicant.

[fol. 9] Mr. Jones: Marion F. Jones, 526 Denham Building, Denver 2, Colorado.

I am an attorney at law and I am admitted to practice before the Commission. I am appearing for the following protestants: Wright Motor Lines, Loving Truck Lines, Buckingham Transportation, Buckingham Express, Buckingham Transfer, and Buckingham Transportation as operator of Des Moines Transportation Company.

Upon behalf of all these carriers I have filed a timely notice of intention to protest.

Mr. Orscheln: My name is Gerald A. Orscheln, 339 North Williams Street, Moberly, Missouri. I am appearing for protestant Orscheln Bros. Truck Lines, Inc. I am a registered practitioner.

Notice of intention to protest was timely filed.

Mr. Gunn: Lauterette and Rebman by G. F. Gunn, Jr., 314 North Broadway, St. Louis, Missouri, I am appearing on behalf of L. A. Tucker Truck Lines.

I filed a timely notice to protest.

I am an attorney and licensed to practice before the Commission.

Mr. Masters: Vernon M. Masters, 1400 Kansas Avenue, Kansas City 5, Kansas. I am appearing on behalf of protestants Southwest Freight Lines, Inc., and Freightways, Inc.



I am a registered practitioner and protest was filed in [fol. 10] accordance with the Commission's rules.

**Exam. Hanback:** Next.

**Mr. Boone:** My name is Thomas D. Boone. I am appearing for protestant Missouri-Arkansas Transportation Company, 1505 Maiden Lane, Joplin, Missouri. I am appearing as a full-time employee of protestant, Missouri-Arkansas Transportation Company.

**Exam. Hanback:** Are there any other protestants?

(No response.)

**Exam. Hanback:** Are there any intervenors in opposition?

(No response.)

**Exam. Hanback:** Is the applicant ready to proceed?

**Mr. Layne:** Yes, sir.

**Exam. Hanback:** Call your first witness.

**Mr. Lane:** Before we proceed, Mr. Examiner, the applicant would like to submit an amendment to the application which would tend to narrow the application and not to broaden it. I have prepared the amendment in the form of an exhibit, which I would like to submit at this time as Exhibit No. 1, and I would also, with the Examiner's permission, like to submit and circulate to all counsel, all parties of record, all of the exhibits which will be introduced by the first witness. We will have some six exhibits. We have them grouped and we can give copies to everybody right now and mark them or would you rather mark them as we come to them?

[fol. 11] **Exam. Hanback:** I prefer to mark them individually.

Off the record.

(Discussion off the record.)

**Exam. Hanback:** On the record.

Proceed.

**Mr. Layne:** Mr. Examiner, I would like to have marked for identification as Exhibit No. 1 a one-page document headed "Amendment to Application MC-117391". This is an amendment to the application which applicant submits



at the present time as an amendment narrowing the requested authority and does not broaden the authority as requested in its original application and as published in the Federal Register.

**Exam. Hanback:** The document is marked Applicant's Exhibit No. 1 for identification.

(Applicant's Exhibit No. 1, Counsel Layne, was marked for identification.)

**Mr. Layne:** We would like also, in order to expedite the hearing, to have marked as Exhibit No. 2 a one-page document headed "Order"—

**Exam. Hanback:** Just give the docket number.

**Mr. Layne:** MC-117391 R-1.

**Exam. Hanback:** The document will be marked Applicant's Exhibit No. 2 for identification.

(Applicant's Exhibit No. 2, Witness Reddish, was marked for identification.)

[fol. 12] **Mr. Layne:** I would like to have marked as Exhibit No. 3 a four-page document which contains a list of states and cities.

**Exam. Hanback:** The document is marked Applicant's Exhibit No. 3 for identification.

(Applicant's Exhibit No. 3, Witness Reddish, was marked for identification.)

**Mr. Layne:** The next exhibit will be an equipment list.

**Exam. Hanback:** The document is marked Applicant's Exhibit No. 4 for identification.

(Applicant's Exhibit No. 4, Witness Reddish, was marked for identification.)

**Mr. Layne:** Exhibit No. 5 will be a statement of financial conditions and is a one-page document.

**Exam. Hanback:** The document will be marked Applicant's Exhibit No. 5 for identification.

(Applicant's Exhibit No. 5, Witness Reddish, was marked for identification.)

**Mr. Layne:** And the last one is Exhibit No. 6, a six-page document, containing a list of shipments.

**Exam. Hanback:** The document is marked Applicant's Exhibit No. 6 for identification.

(Applicant's Exhibit No. 6, Witness Reddish, was marked for identification.)

**Exam. Hanback:** All right, call your witness.

**Mr. Layne:** I would like to call Mr. E. L. Reddish.

[fol. 13] **Mr. Ashton:** Mr. Examiner, I wonder if we might not have a few minutes recess to look at this amendment to see what effect it might have.

**Exam. Hanback:** Yes.

We will take a five-minute recess.

(Short recess.)

**Exam. Hanback:** Come to order, please.

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**E. L. REDDISH** was sworn and testified as follows:

**Direct examination.**

**By Mr. Lane:**

**Q.** Would you please state your name and address for the record?

**A.** E. L. Reddish, Springdale, Arkansas.

**Q.** Are you the applicant in the application here in hearing in MC-117391?

**A.** Yes.

**Q.** Are you applying as an individual?

**A.** Yes.

**Q.** And not as a partnership or a corporation?

**A.** Yes.

**Q.** Does this application represent your first attempt to obtain permanent operating authority from the Interstate Commerce Commission?

**A.** Yes.

**Q.** Other than emergency or temporary authority have [fol. 14] you ever held any operating authority from the Interstate Commerce Commission to operate as a motor carrier?

**A.** No.

**Q.** Do you have any interest in any company or organization which holds any interest in a carrier holding authority from the Interstate Commerce Commission?

**A.** No.

**Q.** I would like to ask you, Mr. Reddish, to examine what has been marked here for identification as Exhibit No. 1 as an amendment to the application in this case. Are you familiar with Exhibit No. 1?

**A.** Yes.

**Q.** Is it at your instruction and direction that the application is amended to conform to the points and places specified in Exhibit No. 1?

**A.** Yes.

**Exam. Hanback:** Are there any objections to the motion to amend?

**Mr. Kretsinger:** No objections.

**Exam. Hanback:** The amendment is allowed.

**Mr. Layne:** Thank you, sir.

#### OFFER IN EVIDENCE

I offer, Mr. Examiner, Exhibit No. 1 in evidence.

**Exam. Hanback:** Is there any objection?

**Mr. Kretsinger:** We have no objection, sir.

**Exam. Hanback:** Exhibit No. 1 is received in evidence.

[fol. 15] (Applicant's Exhibit No. 1, Witness Reddish, was received in evidence.)

**By Mr. Layne:**

**Q.** Mr. Reddish, so far as operating authority is concerned from the Interstate Commerce Commission, do you presently hold emergency operating authority to operate as a contract carrier from the Interstate Commerce Commission?

**A.** Yes, I do.

**Q.** I call your attention to—

**Exam. Hanback:** What was that last question?

**Mr. Layne:** Does he presently hold emergency operating authority from the Interstate Commerce Commission.

**Exam. Hanback:** Very well.

By Mr. Lane:

**Q.** I call your attention to a document which has been marked Exhibit No. 2. Are you familiar with Exhibit No. 2?

**A.** Yes.

**Q.** Is that a copy of the authority granted to you, emergency temporary authority granted to you, by the Interstate Commerce Commission in Docket No. MC-117391 R-1?

**A.** Yes; that and a 15-day extension.

**Q.** Mr. Reddish, Exhibit No. 2, if you will take a look at Exhibit No. 2, you will see that that emergency authority was granted Effective June 13, 1958, for a period of 30 days, the 30-day period accordingly would have expired at the time this hearing is being held today, July 23. Did the [fol. 16] Interstate Commerce Commission issue an extension for a period of time to this emergency temporary operating authority?

**A.** Yes.

**Q.** For what period of time was this emergency temporary authority extended?

**A.** Fifteen days.

**Q.** And it expires at what time?

**A.** July 27.

**Q.** Have you, E. L. Reddish, an individual, filed an application with the Interstate Commerce Commission to obtain temporary operating authority?

**A.** Yes.

**Q.** Was that application for temporary operating authority assigned Docket No. MC-117391, sub No. 1?

**A.** Yes.

**Q.** Have you been informed that the Interstate Commerce Commission has by order of Division 1 of the Commission granted temporary operating authority to you to operate as a contract carrier?

**Mr. Jones:** I object to that question. The order is the best evidence.

**Exam. Hanback:** The objection is overruled.

**What is your answer?**

**A.** Yes.

By Mr. Layne:

Q. When were you informed of that fact?  
[fol. 17] A. Yesterday.

Q. The order was issued yesterday?

A. Yes.

Mr. Layne: Mr. Examiner, I would like to have permission at this time to submit a copy of the order of the Commission, if the hearing concludes prior to my being able to obtain the copy, and make sufficient copies for counsel and to file it as a late-filed exhibit.

Mr. Jones: Mr. Examiner, I would object to that. Certainly it wouldn't be a final order because certainly there will be petitions filed against it.

Exam. Hanback: Petitions filed against what?

Mr. Jones: This order he is talking about. I, for one, will file a petition for reconsideration.

Exam. Hanback: That doesn't go to the weight of the order or as to the evidence.

Mr. Bazelon: I don't see the pertinency of it.

Exam. Hanback: The objections are overruled, all of them.

Proceed.

You may, if you want to, offer an exhibit later, you may do so.

Mr. Layne: Thank you, sir.

Mr. Kretsinger: When will that be filed?

Mr. Layne: I had hoped if the hearing had continued longer than today to have gotten it and distributed copies [fol. 18] of the order for tomorrow. If the hearing continues at a later time, beyond today, it will be distributed at the hearing. If not, I will mail it as promptly as I can prepare copies and submit it to the examiner and mail it as a late-filed exhibit.

Exam. Hanback: You don't have copies of the order today?

Mr. Layne: No, sir.

Exam. Hanback: Is it a large order?

Mr. Layne: Yes, sir.

Exam. Hanback: You don't have it at all?

Mr. Layne: Yes, I received this morning a copy, but the Commission says they are going to issue a corrected order.

May I show it to you? Would you like to see it?

Exam. Hanback: They didn't advise you what the correction would be, did they?

Mr. Layne: Yes, sir, they have misspelled a number of the cities and towns.

Mr. Kretsinger: The import is the same?

Mr. Layne: The import is the same. I could get copies and prepare them for distribution for tomorrow.

Exam. Hanback: There couldn't be any hearing here tomorrow; I don't have any open date. Why don't you try to get it today.

Mr. Layne: We can try but it is an order of several pages in length.

If the counsel will indulge me, I think I can develop the—

Exam. Hanback: The order may be large but what is the [fol. 19] gist of it? What are the points and the commodities? Is that very large?

Mr. Layne: Yes, sir. The order lists as many points as are listed on the exhibit that has been marked for identification as Exhibit No. 3.

Exam. Hanback: Well, let's proceed.

By Mr. Layne:

Q. Mr. Reddish, I call your attention to Exhibit No. 2—

Exam. Hanback: I am going to have to interrupt again. I made the statement you may file an exhibit later. Now, I didn't mean by that you could file a late-filed exhibit.

Mr. Layne: I understand.

Exam. Hanback: I meant at this hearing. All right, let's proceed.

By Mr. Layne:

Q. I will call your attention to Exhibit No. 2, which is the emergency temporary authority. There is a statement in Exhibit No. 2, a reference to specified points. Do you see that reference?

A. Yes.

Q. Can you tell me by reference, for example, Exhibit No. 3, what are the specified points?

A. What are the specified points?



Q. Yes. Are they listed on Exhibit No. 3?

A. Yes.

Q. Does Exhibit No. 3 list the points which were attached [fol. 20] to the application for emergency temporary authority?

A. Yes.

Q. And those are the points referred to as specified points in Exhibit No. 2?

A. Yes.

Q. Mr. Reddish, what has been your experience in operating trucks and in working in connection with carriers subject to regulation by the Commission?

A. Well, my father was in the trucking business from the time I was a small boy till I was grown, and he sold out in 1940 to the Frisco Transportation Company.

Exam. Hanback: Keep your voice up, please. I am sure the people down at the other end can't hear you.

By Mr. Layne:

Q. You will have to speak louder, Mr. Reddish.

A. Do you want me to say that over again?

Q. No, sir. Did you work as a helper to your father in the conduct of his business?

A. I done a little bit of everything.

Q. Did your father operate subject to this Commission's jurisdiction and pursuant to a certificate issued by this Commission?

A. Yes.

Q. You say your father subsequently sold that operating authority?

A. Yes.

Q. And to what company did you say that it had been sold?

[fol. 21] A. Frisco Transportation Company.

Q. And when was the sale of that operating authority?

A. February 1940.

Q. And in 1940 how large an operation was your father conducting?

A. Well, he had from 70 to 80 trucks and about 35 trailers.



Q. And you had been working as assistant to him?

A. Yes.

Q. Subsequent to 1940 did you yourself own any vehicles and operate any vehicles?

A. Before that?

Q. After 1940.

A. Oh, yes.

Q. What did you do?

A. I had a tractor that I pulled for the Frisco Transportation Company for two years.

Q. You drove for Frisco Transportation Company yourself for two years?

A. Yes.

Q. And then did you subsequently go in the army?

A. Yes.

Q. While you were in the army did you work as a mechanic in connection with the vehicles of the army?

A. Yes; two years and a half.

Q. When did you leave the United States Army?

[fol. 22] A. March 19, 1946.

Q. Did you re-enter after that any portion or have any operation in connection with transportation?

A. Yes; I had in '49 and '48 I bought a truck and in '49 I bought a trailer that I hauled produce on till '52. From 1952 I got two more trailers that I hauled produce on, and in '53 I leased all three of them to the Steele Canning Company.

Exam. Hanback: You were hauling produce. Was that intrastate movement, local?

The Witness: No; exempt commodities.

Exam. Hanback: Very well.

By Mr. Layne:

Q. In 1953 you say you leased three vehicles to the Steele Canning Company?

A. Yes.

Q. At the time you leased these three vehicles to the Steele Canning Company were you driving any of the three vehicles?

A. No.

Q. Did you subsequently to 1953 lease more than three vehicles to the Steele Canning Company?

A. Yes. In December 1953 I got one more and through '54 to '58, why, in the process I had nine vehicles.

Q. January 1, 1958, for example, you were leasing nine vehicles to Steele Canning Company?

A. Yes.

Q. Do those vehicles include both tractors and trailers?  
[fol. 23] A. Yes.

Q. Under what terms were the vehicles leased to Steele Canning Company?

A. I was paid by the mile. They furnished the drivers, the insurance, and bought the fuel which was deducted from my mileage.

Q. For what period was the lease?

A. One year.

Q. Did it have a provision for cancellation by either party in it?

A. Thirty days.

Q. Were the vehicles under lease to Steele Canning Company ever subleased?

A. No.

Q. Did anybody else operate them, any other company operate them, other than Steele Canning Company?

A. No.

Q. Did you ever use them for transportation to be performed on your behalf during the time that they were under lease to Steele Canning Company?

A. No.

Q. Now, this mileage rate, you were paid, depending upon the number of miles the vehicles operated, is that the situation?

A. Yes.

Q. And that mileage rate included gas and oil?

A. Gas, oil and tires.

[fol. 24] Q. Were you obligated to maintain the equipment?

A. Yes.

Q. So far as the drivers were concerned who operated on these vehicles, did you hire the drivers?

A. No.

Q. Did you have anything to do with the discipline or discharge of the drivers?

A. No. All I done was run the garage.

Exam. Hanback: Run what?

The Witness: The garage.

Mr. Kretsinger: I didn't hear that.

The Witness: The garage.

A. And I maintained the vehicles.

By Mr. Layne:

Q. Was this your own garage?

A. Yes.

Q. What insurance did you carry, if any, with respect to the equipment that was under lease to Steele Canning Company?

A. Accident insurance only on the equipment.

Q. Was that collision insurance, so far as damage to the equipment was concerned?

A. Yes.

Q. Who carried, if you know, insurance on the cargoes being transported on these vehicles while under lease to Steele Canning Company?

A. Steele Canning Company carried it.

[fol. 25] Q. How about public liability and property damage, do you know who carried insurance in that aspect?

A. They carried the insurance, public liability.

Q. You were paid by Steele Canning Company?

A. Yes.

Q. How often were you paid, were you paid each trip, each week, each month, or on what basis?

A. Once a month.

Q. Have these leases been terminated?

A. Yes.

Q. Do you now have any vehicles under lease to Steele Canning Company?

A. No.

Q. You say you were operating a garage in the maintenance of vehicles. You owned a garage?

A. Yes. I have a parking lot, a one-acre lot, and a garage and an office in Springdale, Arkansas.

Q. I would like to call your attention to Exhibit No. 4, which is the equipment list. Do you have that before you, Mr. Reddish?

A. Yes.

Q. Does that list the equipment owned by you?

A. Yes.

Q. Was this the nine pieces of equipment, nine tractors and nine trailers, that had at one time been under lease [fol. 26] to Steele Canning Company?

A. Yes.

Q. Is that now being operated by you, an individual?

A. Yes.

Q. Is this the equipment that you are now presently using in discharging your obligations under the emergency temporary authority?

A. Yes.

Q. Does Exhibit No. 4 accurately identify the tractors and the trailers which are owned by you?

A. Accurately?

Q. Yes, sir. Is that list correct?

A. Yes, that is correct.

Q. Have you at any recent time made any arrangements for the trade-in or purchase of additional equipment beyond that shown on Exhibit No. 4?

A. I have five tractors traded off that I am supposed to get five new ones the first of August.

Q. Which of the five listed on Exhibit No. 4 have you made arrangements to trade for new ones?

A. No. 3, 6, 7, 8, and 9.

Q. Those are all of the gasoline engine tractors shown on Exhibit No. 4?

A. Yes.

Q. And you say you have made a contract to trade those [fol. 27] for new tractors?

A. Yes.

Q. With what company?

A. International Harvester.

Q. When did you sign that contract?

A. The 8th of June.

Q. With respect to the equipment that is listed on Exhibit No. 4, so far as the tractors are concerned, can you

tell me whether that equipment is sleeper bunked, does it have sleeper bunks?

A. Yes, they are all sleeper cabs.

Q. This is so-called two-man tractors?

A. Yes.

Q. During the period that they were operated by Steele Canning Company do you know whether they were operated with two men, two-man?

A. Yes.

Q. In your operation under the emergency temporary authority have you operated with two men?

A. Yes.

Q. The five tractors which you are buying from the International Harvester Company on this trade-in basis, will they also be sleeper bunk?

A. Yes.

Q. The trailers that are listed here, can you tell me whether these are tandem axle trailers?

[fol. 28] A. They are all tandems. There is one thirty-three, one thirty-two, one thirty-four, and the rest of them thirty-three foot.

Q. Are these trailers van trailers?

A. Yes.

Q. The equipment shown on Exhibit No. 4, is that registered and licensed in the state of Arkansas?

A. Yes, it is.

Q. Mr. Reddish, I would like to call your attention to Exhibit No. 5. Was that exhibit prepared by your accountant?

A. Yes.

Q. Is it, to the best of your knowledge, and information, a true and accurate statement of your financial position?

A. Yes, it is.

Q. I would like to ask you generally with respect to Exhibit No. 5. Have you listed on here assets and properties which are devoted to your business?

A. Yes.

Q. Do you have additional assets as, for example, your home and your private automobile and personal bank accounts that are not listed on here?

A. Yes.

Q. Now, I notice listed on this Exhibit No. 5 under assets fixed an amount shown for tractors and trailers. Can you tell me whether that refers to the tractors and trailers as are shown on Exhibit No. 4?

[fol. 29] A. Yes, it does.

Q. Now I show you farther down under assets fixed there is an amount shown for depreciation reserve. Is that amount primarily depreciation on tractors and trailers?

A. Mostly on the tractors and trailers.

Q. Let's go back under the assets fixed. I see an amount shown for building. What building is that?

A. That's the garage building.

Q. Describe for me this garage building that you have. You say it is in Springdale, Arkansas?

A. It is 34 by 52 feet. It is 20 feet high. Yes, it is in Springdale.

Q. Does it contain an office?

A. Yes, 12 by 20 office. It has a driveway clear through for tractor and trailer and room for one tractor.

Q. Is that area used for the repair of equipment?

A. Yes, it is.

Q. Do you also have a wash rack beside the building for washing and cleaning vehicles?

A. Yes.

Q. When was this building erected?

A. Oh, in the spring, in '55. May and June.

Q. I see also a reference to shop equipment. Is that shop equipment for the repair of vehicles?

A. Yes, it is.

[fol. 30] Q. And is that equipment contained in the building in Springdale, Arkansas?

A. Yes.

Q. By the way, Mr. Reddish, do you have any offices or any buildings for the conduct of your business at any point other than Springdale, Arkansas?

A. No, I haven't.

Q. Are you equipped at this garage to make repairs on both gasoline and diesel equipment?

A. Yes, we are.

Q. I notice an automobile also listed on that. Is that an automobile used in the business?



A. Yes. We have a two-wheel trailer, too.

Q. Mr. Reddish, during the period of time that you leased equipment to the Steele Canning Company, did you have any employees working for you, I mean was there anyone working other than yourself on that business?

A. I had a part-time bookkeeper and a full-time mechanic and a part-time wash boy.

Q. And that's all?

A. Yes.

Q. At the present time can you tell me how many employees you have working other than drivers?

A. I have two mechanics and one man that looks after the trucks, the drivers, the log sheets.

[fol. 31] Q. You will have to speak louder.

A. I say I have two mechanics and one man that looks after the trucks, as to where they are, and checks the drivers and everything, and a full-time bookkeeper: four altogether.

Q. This is other than drivers?

A. Yes.

Q. Mr. Reddish, in the spring of this year, 1958, did a change occur in the operations of the Steele Canning Company?

A. Yes.

Q. What happened in the spring of the year in 1958 with respect to the equipment that you had leased to Steele Canning Company?

A. It seems as though part of the drivers started joining the union and they begin to have labor trouble and part of the drivers would leave and they had an election and voted the union in, and exactly what happened from there I don't know, only that they just almost quit operating, as far as my trucks was concerned.

Q. These were labor difficulties at the Steele Canning Company?

A. Yes.

Q. And the election to which you refer was an election of the Steele Canning Company?

A. Yes.

Q. When did these labor difficulties so far as Steele was concerned commence, so far as you know?



A. Oh, in February, March, somewhere along there.  
[fol. 32] Q. Did that affect the use of your vehicles that were under lease?

A. Yes, when they'd lose drivers they couldn't hire any more and they'd start bringing them back.

Q. Did you have any discussions with the Steele Canning Company with respect to their continuing the use of vehicles in private transportation?

A. Yes.

Q. With whom did you have such discussions?

A. Walter Turnbow.

Q. As a result of these discussions did you make arrangements to apply for operating authority as a contract carrier?

A. Yes, I did.

Q. Was it in reliance on suggestions of Mr. Turnbow and the Steele Canning Company that you made such application?

A. Yes.

Q. Application in this proceeding was filed on May 13, 1958, sent to the Commission, and subsequently published in the Federal Register. Did, after May 1958, labor difficulties increase at the Steele Canning Company with drivers?

A. Yes; they had a strike and part of the drivers pulled out.

Q. What time did this strike occur? Can you give us the time, the date, when that occurred?

A. It was the first of June.

Q. The first part of June?

A. Yes, the first part of June.

[fol. 33] Q. As a result of the strike were picket-lines thrown up?

A. Yes.

Q. Did they have picket lines at the Steele Canning Company?

A. Yes.

Q. By the way, where is the Steele Canning Company located as far as you know?

A. On 71 Highway in Springdale.

Q. In Springdale, Arkansas?

A. Yes, in Springdale, Arkansas, and Lowell, Arkansas.

**Q. As a result of the picketing and as a result of the strike did you have further discussions with the officials of the Steele Canning Company with respect to operating authority?**

**A. Yes, I did.**

**Q. With whom were those discussions held?**

**A. Walter Turnbow.**

**Q. Did you then apply for emergency operating authority to transport certain commodities as shown on Exhibit No. 2 marked for identification in this proceeding to the Interstate Commerce Commission?**

**A. Yes.**

**Q. When did you commence operating under emergency authority granted by the Commission?**

**A. June 13, 1958.**

**Q. Has your operation since June 13, 1958, under the emergency temporary authority, been conducted for the [fol. 34] Steele Canning Company?**

**A. Yes, it has.**

**Q. Are you using all the vehicles that are shown on Exhibit No. 4 in this operation for Steele Canning Company?**

**A. Yes.**

**Q. How many drivers are employed by you?**

**A. Nineteen.**

**Q. Did you take any of your drivers from Steele in this strike situation or did you get other drivers?**

**A. Well, there were seven of them that drove for Steele.**

**Exam. Hanback: Steele, you mean the Steele Canning Company?**

**The Witness: Seven of the drivers wasn't involved.**

**By Mr. Layne:**

**Q. How many drivers in total do you employ?**

**A. Nineteen.**

**Q. When you employed these drivers, the 19 drivers, what sort of standards did you have in the employment of them?**

**A. Well, I knew them all. They are all old men that worked right around there, had in the past.**

**Q.** These were all people personally known to you?

**A.** Yes.

**Q.** Were they all men who had been driving tractor-trailer units in Interstate commerce?

**A.** Yes.

**Q.** I call your attention to what has been identified here as Exhibit No. 6. Can you tell me what Exhibit No. 6<sup>a</sup> is?

[fol. 35] **Mr. Matthews:** I object to that, sir. This obviously is a listing of shipments carried under temporary authority and I believe the protestants should be allowed to look at the freight bills underlying this exhibit before any testimony is brought into the record concerning that exhibit. I believe it will save time in the long-run.

**Mr. Layne:** There isn't any doubt about that, but I am entitled to identify my exhibit. If I can't produce the underlying data, then you are entitled to ask it, you are entitled to see the freight bills.

**Exam. Hanback:** Are the underlying documents present in the hearing room?

**Mr. Layne:** They are, indeed.

**Exam. Hanback:** For examination by opposing counsel?

**Mr. Layne:** They are, indeed.

**Mr. Matthews:** May we do so at the present time?

**Exam. Hanback:** We will take a five-minute recess.

(Short recess.)

**Exam. Hanback:** On the record.

**Mr. Matthews:** Mr. Examiner, I would like to state for the record that I have made a short inspection of the underlying documents. I have had not enough time to make a complete inspection of them as yet.

**Exam. Hanback:** The objection is overruled. Let's proceed.

**Mr. Layne:** Thank you, Mr. Examiner.

[fol. 36] **By Mr. Layne:**

**Q.** Can you tell me what Exhibit No. 6 may be, Mr. Reddish?

**A.** That is a list of all the loads I have hauled up to last week for Steele Canning Company since the emergency authority went into effect.

Q. I would like to ask you a few questions about Exhibit No. 6. In the first place, I notice that in the first column on the left-hand side it is headed "Load Number" and there follows a series of numbers, beginning with number one. What does that number one mean?

A. Just what it says, the load number.

Q. In load number one there are five individual shipments listed in that load number?

A. Yes.

Q. Were all those shipments carried on one truck at one time?

A. Yes.

Q. And all those shipments originated on the date shown in column number 2?

A. Yes.

Q. At the point shown in column number three?

A. Yes.

Q. And were delivered each individually to the points shown in column No. 4?

A. Yes.

Q. And the weight shown in column No. 5 is the weight [fol. 37] of the individual shipment?

A. Yes.

Q. In the instance, for example, of load No. 4 you have Anniston, Alabama, listed twice as a destination point in that load.

A. Yes.

Q. Were there two destinations within Anniston, Alabama?

A. Two drops.

Q. To places in Anniston, Alabama, to make a delivery?

A. Yes.

Q. With respect to the transportation that is shown here on Exhibit No. 6, who dispatches the vehicles?

A. I do when I am there.

Q. And when you are not there who does?

A. Joe Saffley.

Q. Is that the man who works in your office?

A. Yes.

Q. How are you notified of a particular shipment to be transported, who contacts you?

A. The Steele Canning Company's dispatch.

Q. And you then send a vehicle to Steele Canning Company?

A. Yes.

Q. Who loads the vehicle?

A. They load. The drivers take the truck and check the load on.

Q. Then who unloads the vehicle?

A. The driver.

[fol. 38] Q. How do you keep in touch, if you do, with vehicles during the period of time that they are dispatched from Springdale, Arkansas, or Lowell, Arkansas, to some of these points such as Anniston, Alabama?

A. I have them call. Sometimes the next day and then sometimes the day after that, according to what they are supposed to do. If they have a breakdown or running late or anything, why, I have them call.

Q. And they call you and check in as to the progress of their movement?

A. Yes.

Q. That is by long distance telephone?

A. Yes.

Q. On Exhibit No. 6 there are shown some loads or some shipments that were picked up at a point, for example, other than Springdale, as, for example, Elwood, Indiana, for return to Springdale, Arkansas, and that is load No. 6, which appears on Exhibit No. 6, page 1. That was a load consisting of cans and lids?

A. Yes.

Q. How did you get instructions to pick up that load?

A. The Steele Canning Company give the load and order. They make out an order for each load of the cans.

Q. Do you instruct your drivers where to go to pick up that load?

[fol. 39] A. Yes, they take the order with them.

Q. Has anyone paid you for covering load No. 6, for example, on Exhibit No. 6?

A. Yes.

Q. Who paid you for that transportation?

A. The Steele Canning Company.

Q. Do you bill Steele Canning Company for it?

A. Yes.

Q. In addition to the transportation shown on Exhibit No. 6, have you transported any exempt commodities or loads of exempt commodities that are not shown on Exhibit No. 6?

A. Some.

Q. How many would you say in total since June 13, 1958?

A. Oh, eight or ten.

Q. Who was the shipper or for whom did you transport those?

A. Well, it was different people. Mostly H. C. Schneiding.

Q. Where is that company located?

A. Springdale, Arkansas.

Q. What kinds of commodities were transported for that company?

A. Potatoes, Irish potatoes.

Q. Is that all?

A. Yes.

Q. Have you performed any other transportation?

A. No. Now, what did you mean by that?

Q. I mean have you transported any other commodities [fol. 40] other than the exempt commodities that you just referred to and the commodities shown on Exhibit No. 6 since June 1958 in interstate commerce?

A. No.

Q. With respect to the shipments shown on Exhibit No. 6, have all those shipments been paid for by Steele Canning Company?

A. Yes.

Q. Do you bill Steele?

A. Yes.

Q. And do they pay for the transportation involved?

A. Yes.

Q. Mr. Reddish, do you understand that the application that you have in hearing here is the application of a contract to perform service in interstate commerce as a contract carrier by motor vehicles?

A. Yes, I do.

Q. Do you understand that the application that is presently filed with the Commission and has been amended here, pursuant to authority by the Examiner, is limited to per-

form contract service on behalf of Steele Canning Company, Keystone Canning Company, and Cain Canning Company?

A. Yes.

Q. Are you prepared to enter into continuing contracts as may be required for the transportation of the described commodities in interstate commerce on behalf of these companies?

[fol. 41] A. Yes, I am.

Q. Mr. Reddish, do you presently have on file with the Interstate Commerce Commission cargo, public liability, and property damage insurance?

A. Yes, I have.

Q. Can you describe the cargo insurance which you presently have covering your operations?

A. It is one hundred thousand, three hundred thousand, and fifty thousand.

Q. Let's go back. Is the \$50,000 cargo damage?

A. No.

Q. Property damage?

A. Property damage.

Q. Now, the hundred thousand dollars and the three hundred thousand dollars, does that refer to public liability?

A. Yes, one hundred thousand each person and three hundred thousand each accident.

Q. How much cargo insurance do you carry?

A. It is up to \$10,000 for each load.

Q. Have you made any filings with the Interstate Commerce Commission?

A. On cargo?

Q. On insurance.

A. Yes.

Q. Mr. Reddish, do you have a system for the regular [fol. 42] inspection and maintenance of your vehicles?

A. Yes, I do.

Q. Can you describe for me briefly what that system is for the maintenance and repair of your vehicle?

A. Well, every week they are serviced whether they need it or not, and then the drivers fill out a report each time they come in as to the condition of the vehicle and the mechanic, then he takes the report and goes over it to correct any deficiencies.



Q. Do you maintain records as to the repair and maintenance of your vehicles?

A. Yes, I do.

Q. Mr. Reddish, are you familiar with the fact that the Interstate Commerce Commission has safety regulations applying to the operation of vehicles in interstate commerce?

A. Am I familiar?

Q. Yes, are you familiar with the fact the Commission has them?

A. Yes.

Q. Are you familiar with those regulations?

A. Yes.

Q. Have you yourself operated pursuant to the logs and hours of duty requirements of the Commission so far as drivers are concerned?

A. Yes, I have.

Q. Do you have someone employed by your company who [fol. 43] now checks logs of the drivers for the transportation in interstate commerce shown on Exhibit No. 6 that has been performed under the emergency authority?

A. Yes.

Q. Do you have medical certificates as to the physical condition of all the drivers employed by you?

A. Yes.

Q. Do you now presently have workmen's compensation insurance covering the drivers employed by you?

A. Yes, I have.

Q. By the way, Mr. Reddish, how do you pay your drivers?

A. By the week.

Q. Do you deduct Social Security and withholding taxes on your drivers?

A. Yes.

Mr. Layne: That is all I have. Thank you.

Exam. Hanback: You may cross examine.

**Cross examination.**

**By Mr. Ashton:**

**Q. Mr. Reddish, referring to your Exhibit No. 1, amendment to application—**

**Exam. Hanback:** May we go off the record just a minute.

**(Discussion off the record.)**

**Exam. Hanback:** On the record.

**By Mr. Ashton—continuing:**

**Q. —and then the Exhibit No. 3, list of points, am I correct in my understanding that the authority that you [fol. 44] are seeking today is not limited to the points that are shown on your Exhibit No. 3?**

**A. No.**

**Q. You mean I am not correct?**

**A. You are correct.**

**Q. I am correct. You are asking for authority, for example, with respect to Indiana of every point in Indiana, not limited to the specific points that are on your Exhibit No. 3?**

**A. If Steele Canning Company sells there.**

**Q. Did you furnish all of the vehicles that are used by the Steele Canning Company?**

**A. No, I didn't.**

**Q. How many vehicles did they use altogether?**

**A. I don't know exactly.**

**Q. You don't know?**

**A. No.**

**Q. In your temporary authority or petition I believe you stated they used 29, did you not?**

**Mr. Layne:** Do you have a copy of the temporary application, temporary authority application, that you can show him?

**The Witness:** I haven't got that up here.

By Mr. Ashton:

Q. Do you know who is furnishing vehicles to the Steele Canning Company other than your company?

A. Well, they had many of their own. I knew one other man that had four and outside of that I don't know.

[fol. 45] Q. Will they continue to use their own vehicles?

Mr. Layne: Mr. Examiner, I would like to interpose here. I want to assure the counsel who is presently cross-examining that the general manager of the Steele Canning Company will be the next witness, and who will testify in detail concerning their operations.

By Mr. Ashton:

Q. Mr. Reddish, did you ever lease any vehicles to the Keystone Company?

A. No, I never.

Q. Or to the Cain Company?

A. No, sir.

Q. Have you entered into a contract with the Steele Canning Company?

A. Yes.

Q. Do you have a copy of that contract that you intend to produce at this hearing?

Mr. Layne: I can answer that question for him. We have filed, as required by the Commission, in accordance with the emergency authority a schedule of minimum rates and charges together with the appropriate contracts referred to in the schedule of minimum rates and charges which are on public file with the Commission.

Mr. Ashton: Will that be the same contract that is involved in this application?

Mr. Layne: Substantially the same, depending upon the Commission's grant of authority.

[fol. 46] By Mr. Ashton:

Q. Can you tell us what your minimum rates and charges will be under the proposed contract with the Steele Canning Company?

A. Why, no, I couldn't remember all of them.

Q. You are not in a position to put those in this record at all in any way?

A. No.

Q. Do you have a contract with the Keystone Company?

A. We have a proposed contract.

Q. Do you have a proposed contract with the Cain Canning Company?

A. Yes.

Q. Have they been executed subject only to the approval of the Interstate Commerce Commission?

A. Yes. Maybe I was wrong about that.

Exam. Hanback: Let's clarify the record.

Mr. Layne: I think the witness is confused on the use of your word "executed".

By Mr. Ashton:

Q. Have they been signed?

A. No.

Q. You have no firm contract now, as I take it, then, with any of these companies, Steele, Keystone, or Cain?

A. I have with Steele.

Q. But not with Keystone or Cain?

A. No.

[fol. 47] Q. Does the contract with the Steele Canning Company include the movement by you as a contract carrier of inbound commodities?

A. Yes.

Q. And those commodities are those that are listed in your application?

A. Yes.

Q. And does that contract provide for a minimum schedule of rates and charges with respect to those inbound commodities?

A. Yes.

Q. Is that contract filed with the Commission as a part of this application?

A. Yes.

Mr. Layne: No.

The Witness: It is not?

**Mr. Layne:** Mr. Examiner, may I interpose so that the record will be clear. A contract has been filed with the Interstate Commerce Commission covering the transportation as authorized to be performed pursuant to emergency temporary authority. The application in hearing here does not require and there has not been signed any contract covering the application, the authority, for which is sought; that will be executed only when and as and if the Commission grants the authority and it becomes effective.

**By Mr. Ashton:**

**Q.** Have you reached an agreement with the three companies [fol. 48] as to what your rates and charges will be if this authority is granted?

**A.** Have I reached an agreement?

**Q.** Yes. Do you have an understanding with them as to what your rates and charges will be if this authority is granted?

**A.** No.

**Q.** If the three companies don't agree to pay you what you want, then you won't exercise this authority, I take it?

**A.** Well, the rates are on file but then they haven't been approved.

**Exam. Hanback:** The rates are on file with the Steele Canning Company only?

**The Witness:** Yes, with the Steele Company.

**Mr. Layne:** That is right.

**By Mr. Ashton:**

**Q.** Will the rates on file with the Steele Canning Company be the same rates that you will charge if this authority is granted?

**A.** Yes.

**Q.** Will they be the same rates that you will charge to the Keystone Canning Company?

**A.** Yes.

**Q.** If Keystone agrees to them?

**A.** Yes.

**Q.** Have they stated that they would agree to those rates and charges?

[fol. 49] A. Yes.

Q. Is that true also of the Cain Canning Company?

A. Yes.

Q. Have you ever performed any transportation service for the Keystone or Cain Companies?

A. No.

Q. Do you know how they are presently moving their commodities?

A. No.

Q. Mr. Reddish, if you will refer to your Exhibit No. 6.

A. Yes, sir.

Q. Do you have any intrastate authority?

A. No, I haven't.

Q. Please refer to shipment No. 15. Under what authority did you make that shipment?

A. Well, I don't know. You will have to let them answer that.

Exam. Hanback: Let who answer it?

The Witness: The attorney.

Mr. Jones: I can't hear the witness.

Exam. Hanback: He said he wanted his attorney to answer the question.

Mr. Layne: There is an application pending.

Mr. Joyce: We couldn't get them in all 33 states overnight.

Mr. Matthews: We are having a hard time hearing that conversation.

[fol. 50] Mr. Ashton: Is that conversation on the record?

Mr. Layne: If you want a statement of counsel, there has been an application filed for intrastate authority.

Mr. Ashton: I didn't ask for a statement from counsel.

Mr. Layne: The operation being conducted is operated under application in Arkansas.

Mr. Ashton: I am not familiar as to the—

Mr. Layne (interrupting): I object to any further inquiry because the Interstate Commerce Commission has no authority to enforce the laws of Arkansas.

Mr. Matthews: I think this shipment should probably be stricken from this exhibit, then.

Exam. Hanback: The objection is overruled.

Did you make a motion?

Mr. Matthews: Yes, sir.

Exam. Hanback: The motion is overruled, too.

By Mr. Ashton:

Q. Mr. Reddish, do you have any idea as to what the total outbound tonnage of the Steele Canning Company to the points involved in your application will be in a year's time?

A. Well—

Mr. Layne: I object.

A. (Continuing)—I have that but I haven't got any figures on it now. I couldn't answer that.

Mr. Ashton: I didn't hear the objection.

[fol. 51] Mr. Layne: I withdraw it.

By Mr. Ashton:

Q. Do you have any idea what the outbound movement of the Keystone Canning Company to the points involved in this application are within one year's time?

A. No.

Q. Is that also true of the Cain Canning Company?

A. Yes.

Q. Is that also true of the inbound commodities covered by your application to the three companies?

A. Well, we have had the figures as to the extent but then I don't remember what they are now. That gets pretty big.

Mr. Ashton: If I may inquire of counsel, will the witness for the Steele Canning Company testify?

Mr. Layne: Yes.

Mr. Ashton: How about Keystone?

Mr. Layne: Yes.

Mr. Ashton: How about Cain Canning Company?

Mr. Layne: Yes, sir. If you will give me a chance, I will have them all on and they will tell you that.

Mr. Ashton: I think those are all the questions I have of Mr. Reddish.



**Cross examination.**

**By Mr. Bazelon:**

**Q.** Mr. Reddish, do you do anything other than conduct this trucking operation?

**A.** No.

[fol. 52] **Q.** You have no other interests at all?

**A.** No.

**Q.** Does any member of your family have any other interest, immediate family.

**A.** Well, they all work.

**Q.** Do any of them work or have anything to do with any of the canning companies involved in this application?

**A.** No.

**Q.** Have you ever worked for any of the Canning Companies or had any interest in any of the canning companies?

**A.** No.

**Q.** How about members of your family?

**A.** No.

**Q.** Do I understand that prior to June 13, 1958, your exclusive business was the leasing to the Steele Canning Company of nine vehicles?

**A.** That is right.

**Exam. Hanback:** Just a minute.

**Didn't you operate a garage?**

**The Witness:** That was only to keep the trucks up that was leased to Steele Canning Company and not a public garage.

**By Mr. Bazelon:**

**Q.** So that occupied your time and your finances, is that correct?

**A.** That is correct.

**Q.** And the same is true of your immediate family?

[fol. 53] **A.** To what?

**Q.** And the same is true of your immediate family, they have had nothing to do with the canning companies either, is that right?

**A.** No.

Q. The equipment shown on Exhibit 4 are all straight van jobs, are they not, these semi-trailers?

A. Four of them has bunkers and blowers in them.

Q. And the rest of them are plain vans?

A. Yes.

Q. Four have the dry ice blowers and—

A. (Interrupting) Wet ice.

Exam. Hanback: Let's clarify this now. How many vehicles was it?

The Witness: Nine trailers.

Exam. Hanback: Four of them have dry ice blowers?

The Witness: Wet ice.

Exam. Hanback: What do the others have?

The Witness: They are just straight vans.

Exam. Hanback: No refrigerated?

The Witness: No.

Exam. Hanback: Very well.

By Mr. Bazelon:

Q. Are your drivers unionized?

A. No.

Q. Is the strike still on at Steele?

A. Yes.

[fol. 54] Q. Do you know whether or not there is a strike over at Keystone and Cain?

A. I don't know about that.

Q. Are there pickets there?

A. No.

Q. Do I understand that all of your units are presently used exclusively to transport the shipments which are shown on Exhibit No. 6?

A. That is right.

Exam. Hanback: You have handled several shipments of exempt commodities?

The Witness: A small amount.

By Mr. Bazelon:

Q. Those would be return loads, would they not?

A. Yes.

Q. They wouldn't be outbound?

A. No, no outbound.

Q. It is my understanding that you conduct no intrastate operations except as they may be shown on Exhibit 6?

A. That is right.

Q. On Exhibit No. 1 you have excluded, for example, Chicago, Illinois, in this application, is that correct?

A. That is correct.

Q. Part of the Chicago, Illinois, Commercial Zone is located in the State of Indiana. May I ask whether or not it [fol. 55] is your intention to exclude by this application that portion of the Chicago Commercial Zone located in Indiana?

Perhaps I should direct it to your counsel.

Mr. Layne: I will be glad to answer it so the record will be clear. The intention is not to exclude.

Mr. Bazelon: Is that true of the other commercial zones where part of the commercial zone may be in another state?

Mr. Layne: That is true.

By Mr. Bazelon:

Q. Sir, is June and July a heavy shipping month in so far as the canning business is concerned in Arkansas?

A. Yes.

Q. It is the height of the season, so to speak?

A. Well, I wouldn't say that, but it is heavier than usual.

Mr. Bazelon: I believe that is all. Thank you.

Cross examination.

By Mr. Kretsinger:

Q. I didn't get when the leases were terminated between you and the Steele Canning Company?

A. June 12.

Q. June 12?

A. Yes.

Q. Did I understand you to say that you had a 30-day cancellation provision in the lease?

A. Yes.

Q. And the temporary authority was granted for you to

commence operations as a contract carrier on June 13, the [fol. 56] next day after the cancellation of the lease?

A. Yes.

Q. And was it on June 12 that you were given notice that they were cancelled?

A. Do what?

Q. Was it on June 12 that you were given notice or that you gave notice that the leases were to be cancelled?

A. No. The trucks were settin' on the lot so we agreed to just cancel the leases.

Q. It was cancelled by mutual agreement?

A. Yes.

Q. On the same day that you talked about it?

A. Yes.

Q. Is that right?

A. Yes.

Q. Is the Steele Canning Company still operating any other equipment which they have leased from some other party?

A. I think so, but I couldn't answer that for sure.

Q. Did the Steele Canning Company tell you that it wanted the lease cancelled or did you tell the company that you wanted it cancelled?

A. We just agreed to it as far as I can remember.

Q. And was that because of this unionization?

A. Yes.

Q. But as far as you know they are still operating leased equipment?

[fol. 57] A. As far as I know, but they wasn't operating mine.

Q. I understand.

Mr. Kretsinger: That is all I have. Thank you.

Cross examination.

By Mr. Harding:

Q. I take it that through the years that this equipment was leased to the Steele Canning Company you have become somewhat familiar with their kind and type of distribution, have you not?

A. Yes.

Q. First of all, do you know at what points the Steele Canning Company has producing plants?

Mr. Layne: Mr. Examiner, I object to this line of questioning because we intend to produce the general manager of the Steele Canning Company who would be the best witness on this score, and we are just extending cross examination, because I intend to go into all of this.

Mr. Harding: I submit, Mr. Examiner, I am curious about even the amendment that you have here, and I can't proceed further unless I know where your producing points are.

A. What do you have reference to?

Exam. Hanback: The objection is overruled.  
You may answer.

By Mr. Harding:

Q. Where does it have canning plants, do you know?

A. Springdale, Arkansas.

[fol. 58] Q. Is that the only one?

A. Lowell, Arkansas, Westville, Oklahoma, and Fort Smith, Arkansas. That is all I know.

Q. Under the amendment, Exhibit No. 1, I see that you are asking for authority to operate, let's say, for instance, from Westville, Oklahoma, on the one hand, to all points in Oklahoma except Oklahoma City and Tulsa. Now, is it your belief that that will be a movement in interstate commerce?

A. Well, no.

Q. It would not be?

A. No.

Q. And by the same token in the second portion of the amendment you also are requesting authority from the Commission here from Oklahoma, except Oklahoma City and Tulsa, into Westville, Oklahoma, are you not, the reverse movement?

A. Yes.

Q. And would your answer be the same, sir, that that would not be a movement in interstate commerce?

A. I don't see the reason in the question.

Q. I don't see the reason in the application as far as that goes.

Exam. Hanback: Can you answer the question?

The Witness: Yes.

Exam. Hanback: You don't know whether it will be or not?

The Witness: It would not be.

By Mr. Harding:

Q. It would not be. On Exhibit 6, through the years [fol. 59] in the servicing of this equipment have you become somewhat familiar with the territory that it has been dispatched to?

A. Yes.

Q. Would you say that the movements which you have handled on Exhibit 6 are fairly representative of the kind and type of traffic that that equipment has handled in years past?

A. Yes.

Q. I note on the exhibit, sir, that you have no shipments whatsoever originating in the State of Nebraska consigned to any southern destination point.

A. No.

Q. And that's been generally—

Exam. Hanback: Just a minute.

Finish your answer.

A. On the emergency authority it does not cover anything back from Nebraska.

By Mr. Harding:

Q. It does not authorize it?

A. No.

Q. From my understanding the Steele Canning Company has no producing plants in the State of Nebraska?

A. As far as I know.

Q. Do you know whether Keystone or Cain has any producing plants in that state?

A. No, I don't.

[fol. 60] Q. Mr. Reddish, in the event this application was granted only partially, would it be your intention in the future to again lease equipment to the Steele Canning Company in order to handle other of their shipments to points which you were not authorized to serve under your contract permit?

A. No, I don't think I could do that.

Q. In the event there was no legal prohibition against it, would you propose to do that?

A. No, I never thought about it. I didn't intend to.

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

Mr. Harding: Just one last question, if I may, please.

By Mr. Harding:

Q. Mr. Reddish, in the event the Commission saw fit to grant this permit to you, either partially or in its entirety, would you be willing to accept a condition in connection therewith restricting the service to the three canning companies which you have referred to?

A. Restricting it? Yes.

Exam. Hanback: It is already restricted; the application has restricted it to three shippers.

Mr. Harding: In the permit itself.

Mr. Layne: Yes. I state right now that we asked the Commission to and expect the Commission to limit the authority, to specify named shippers.

[fol. 61] Exam. Hanback: Three only.

Mr. Layne: And three only, identified here.

Mr. Harding: All right, just so we are clear.

That is all I have. Thank you.

Exam. Hanback: Next.

Cross examination.

Mr. Matthews: May I direct a question to counsel?

Exam. Hanback: Very well.



Mr. Matthews: I would like to know, sir, whether or not we would be permitted to see the contract under which the applicant is operating under emergency temporary authority.

Mr. Layne: You will be permitted to see all that is filed for public inspection with the Commission, which would be our tariff, and the attached papers, including the contract.

Mr. Matthews: May we do it now?

Mr. Layne: If we have it.

Do we have it, Jack, do we have one?

I don't know whether we have it here. Shall we go ahead and I will let you look at it at lunchtime.

Mr. Matthews: I have two or three other questions. I would like to do it before cross-examination is completed. May I see the underlying documents?

Mr. Layne: Skip your order.

By Mr. Matthews:

Q. Sir, I hand you various underlying documents to Exhibit No. 6 and ask you whether or not, in so far as [fol. 62] your company is concerned, the delivery receipts on the shipments from Springdale, Arkansas, are shown on Exhibit 6.

A. Yes.

Q. Will you explain for the record just how those show that delivery was accomplished?

A. They are signed by the receiver.

Exam. Hanback: Signed by who?

The Witness: You can never read those guy's signature where they are delivered.

Exam. Hanback: Who signed it, your employees or—

The Witness: No. The employee of Koehler Hotel and Restaurant Supply.

Exam. Hanback: That is one particular shipment you are referring to?

The Witness: Yes.

By Mr. Matthews:

Q. Can you relate this particular bill to the shipment on Exhibit No. 6?

Exam. Hanback: Identify that bill, some pro number or something.

By Mr. Matthews:

Q. Here is Exhibit No. 6, can you relate that particular bill there to shipment shown in Exhibit 6?

A. This is a load of cans. This bill hasn't got anything to do—

Q. (Interrupting) This is a load of cans from Springdale, Arkansas?

[fol. 63] A. No. This is a load—

Exam. Hanback: Which are you referring to, freight bill, Mr. Witness?

The Witness: Yes. But he is referring to this (indicating).

Exam. Hanback: When you are saying "this" you are saying Exhibit 6, what are you talking about, Mr. Witness, are you going to talk about the freight bill or Exhibit No. 6?

The Witness: Either one.

Exam. Hanback: Clarify it, then.

The Witness: That is what I don't understand what he wants to talk about.

By Mr. Matthews:

Q. What I am trying to do is to ask you, sir.

Exam. Hanback: Before you start are you going to ask the witness about this bill? What is the date of it and does it have a number?

Mr. Matthews: It doesn't have any number. I am trying to relate this bill to Exhibit No. 6 so we can make some sense out of the exhibit.

Exam. Hanback: The bill is dated July 12, 1958, consigned to Koehler Hotel, Restaurant And Supply Company, Indianapolis, Indiana. Is that correct, Mr. Witness?

The Witness: Yes.

By Mr. Matthews:

Q. Would that be shown on page 5 of Exhibit No. 6? [fol. 64] Would that be shown as load No. 104 on page 6?

Exam. Hanback: Page 6?

A. Yes, that is what it is on.

Exam. Hanback: Just a minute now. It is shown as load 104, page 6 of Exhibit 6?

Mr. Matthews: Yes, sir.

By Mr. Matthews:

Q. Now, referring to that load No. 104, would you show me the bills which underlie that particular load?

A. Did you find the other two?

Q. No, sir, these are not my bills; I am asking you.

A. Well, you was the one that dug these two out.

Q. I had five minutes to look at these, sir.

Mr. Layne: We will get them for you. Here you are. Here is the other copy of it.

By Mr. Matthews:

Q. That is not the delivery receipt that counsel just gave you, is it?

A. No. That is the load bill.

Q. What I am asking you, sir, is for the delivery receipts which would cover that particular load.

A. Well, it is here. It is not in this pile.

Q. Do you have them?

Exam. Hanback: All right, let's proceed.

You can't find but two bills? What is your answer, Mr. Witness?

A. They was brought up and evidently they were put [fol. 65] in another file or something.

Exam. Hanback: Let's proceed.

Mr. Matthews: I have no desire to lengthen this line of questioning, but I understand or my understanding was the applicant does have the underlying documents for Exhibit No. 6.

Mr. Layne: We do.

Mr. Matthews: If they are not correlated in any particular way I am going to have a pretty difficult time cross-examining.

Exam. Hanback: Go to other exhibits. You can come back to this question.

The Witness: They are all on this one here (indicating).

By Mr. Matthews:

Q. But that isn't the delivery receipt, is it?

A. No; that is a copy of the bill that went out.

Q. Can you show me the underlying documents on any particular load, then, to expedite things?

Mr. Layne: Certainly, we can. Let me state now that the exhibit was prepared under my instruction and prepared from the one copy of the bill, and those copies of the bill are in order. We also brought as an extra precaution the delivery receipts which are kept in another file for another purpose entirely and were not correlated. If you want to see the delivery receipts specifically for a particular shipment, let me know what it is and we will try to correlate them for you.

Mr. Matthews: I asked for 104, and in order to expedite the hearing I asked for any particular shipment.

[fol. 66] Exam. Hanback: Let the counsel select another shipment.

The Witness: Do you want these two (indicating)?

Mr. Matthews: Let's just keep those.

Exam. Hanback: Counsel—

Mr. Matthews: For the convenience of the applicant I am willing to accept any load.

Exam. Hanback: Number one.

A. Six and the fourteenth, number one, do you want?

By Mr. Matthews:

Q. It is immaterial to me, sir. Any one that is convenient to the applicant.

Mr. Joyce: We will have it in just a minute, sir.

By Mr. Matthews:

Q. Sir, to expedite things, while counsel are attempting to correlate the delivery receipts, I will ask one or two other questions in respect to the contract.

Exam. Hanback: Very well.

By Mr. Matthews:

Q. I will refer you to Item 30 of the contract.

A. I have it here.

Q. And I will ask you to state what it says.

Mr. Layne: That is not the contract.

Mr. Matthews: This (indicating) is not the contract?

Mr. Layne: No, sir; that is a schedule of minimum rates and charges.

Mr. Matthews: I asked for the contract.

Mr. Layne: You asked for two things, sir. You asked [fol. 67] for the contract and you asked for the rates. The rates for a contract carrier is contained in its schedule of minimum rates and charges on file with the Commission and I told you I would produce the contract and those rates so far as we had them available here. I have produced for you what is known as a "W" schedule of a contract carrier for minimum rates and charges applicable on emergency temporary operating authority. I will state now I do not have the specific contract. A copy of that contract, however, is on file with the Commission but it is not available to public inspection. I do not have the contract, an original copy, or any copy of the contract here in Kansas City today because I do not consider it pertinent to applicant's case to have it.

Mr. Matthews: Thank you, sir. I understand the document you gave me is the schedule of charges which will be followed or which has been followed by the applicant in its operation under emergency temporary authority, is that correct?

Mr. Layne: Pursuant to the statute they can charge no lower rates than those in that schedule.

By Mr. Matthews:

Q. Now referring to form W-2, Item 30, would you state what that says?

A. Item 30, do you mean you want me to read it?

Q. Either read it or paraphrase it.

A. All shipments shall be billed at actual gross weights; the carrier will not be required to accept loads of less than [fol. 68] 20,000 pounds on canned goods, 10,000 pounds on empty containers, or 15,000 pounds on fiberboard boxes.

Q. Do you propose to transport individual shipments at weights below those particular minimums?

A. Individual shipments?

Q. Yes.

A. Yes.

Q. In other words, you have a right to and you propose to do so?

A. Yes.

Mr. Matthews: Have you found any?

Mr. Joyce: That is number one load, Exhibit No. 6, page 1.

By Mr. Matthews:

Q. Now we have here, as I understand, delivery receipts for the shipments shown as load number one on Exhibit No. 6. Would you state the name of the shipper and the name of the consignee for the load which is shown as 8,925 pounds?

A. The shipper: Steele Canning Company, Springdale, Arkansas; the consignee is the Tracey and Avery Company, Mansfield, Ohio.

Q. And what was the charge?

A. \$1.10 a hundred.

Q. Now, do the same thing for the one that shows 1,650.

A. Steele Canning Company, Springdale, Arkansas, To Bloom and Klein, Inc., Canton, Ohio.

Q. The charge?

A. Three thousand pounds.

[fol. 69] Q. The same thing as for the shipment shown as 3,100 pounds?

A. Do you want me to read the other two?

Q. The same information from the shipment that shows 3,100.

A. The Steele Canning Company, Springdale, Arkansas; consignee, whichever it is, Dan Miller Grocery Division, Consolidated Foods Corporation, Canton, Ohio.

Q. The same thing for the shipment which is shown as 13,575 pounds?

A. Steele Canning Company, Springdale, Arkansas, to Betsy Ross Foods, Inc., Akron, Ohio.

Q. The charge?

A. Ninety cents a hundred.

Q. Finally the one for the shipment showing 5,090 pounds?

A. Steele Canning Company, Springdale, Arkansas, to John du Ross and Company, Cleveland, Ohio.

Q. The charge?

A. \$1.04.

Q. That actually, is it not, a combination of less than truckload shipments?

A. Right.

Q. There is no stop in transit charge of any nature?

A. No.

Q. There has been no diversion in any of those shipments?

A. No what?

Q. Diversion. In other words, you delivered it to the [fol. 70] point which is specified there in the bill?

A. That's right.

Q. As a matter of fact, the exhibit shows the origin point would be Lowell, Arkansas, doesn't it?

Exam. Hanback: Where are you referring to?

Mr. Matthews: This is load number one.

A. That is where it was loaded.

By Mr. Matthews:

Q. Do you have any explanation for that?

A. The Steele Canning Company's office is in Springdale, Arkansas. If anybody else hauled it from Lowell, Arkansas, they would bill it from Springdale, Arkansas.



Q. So the bills of lading do not show the actual origin point?

A. The actual loading spot?

Q. The origin point of the shipment.

A. It originated at Springdale, Arkansas; Lowell, Arkansas, is five miles up the road.

Q. Well, it is a different town, isn't it?

A. Yes.

Q. Sir, without going through any more bills, one other question first.

I refer you to the bill covering shipment consigned to Dan Miller, 3,100, and ask you to state whether or not there is anything on that bill which would show the date of delivery.

A. No, there is not.

Q. I ask you the same question with respect to the ship-[fol. 71] ment, on the bill covering the shipment, consigned to Bloom and Klein, 3,000 pounds, is there anything to show when that was delivered?

A. No.

Q. Sir, without going through all of the bills, would you say that those bills are reasonably typical of the delivery receipts underlying each of the shipments shown in Exhibit 6?

Mr. Layne: I object to that.

You mean those two bills out of four bills that you had for one shipments, five bills, are typical, when three of them that you didn't ask about had the date of delivery, for example, on it?

Mr. Matthews: I have a question pending.

Mr. Layne: I object to it.

Exam. Hanback: Will you read the question?

(Question read.)

Exam. Hanback: What bill are you referring to?

Mr. Matthews: What I am attempting to do, sir, is to find out if these bills covering load number one are typical of the bills covering all the loads. If not, I am going to have to proceed further.

Exam. Hanback: The bill you are referring to covers five original shipments.

Mr. Matthews: That is right, showing load number one.

Exam. Hanback: The objection is overruled.

[fol. 72] A. What do you refer to as typical?

By Mr. Matthews:

Q. What we have been talking about and what they show and that sort of thing.

A. I don't thoroughly understand what you mean. As far as I can understand it, why, it would be.

Q. I beg your pardon?

A. As far as I understand your question it would be.

Q. This is your typical way of billing and typically some of them show delivery dates and some of them don't?

A. That is right.

Q. That is your typical method of billings?

A. Yes.

Q. And all of these which are shown as loads are merely consolidation of less than truckload shipments?

A. Yes.

Q. Which are carried as individual rates to each point?

A. Yes.

Mr. Matthews: That being the case we won't need to pursue it further.

By Mr. Matthews:

Q. As I understand your testimony you do not have any specific proposal to purchase any additional equipment, aside from the replacement of equipment?

A. Proposal?

Q. Yes, sir, under this application.

A. If I am granted the authority, why, I will.

[fol. 73] Q. You will buy additional equipment?

A. Yes.

Q. How much?

A. Well, now, that's getting pretty far off.

Q. You have no specific proposal as to how much you would buy?

A. No, I have no specific proposal. Just whatever was needed.

**Q.** If this application is denied do you propose to again lease your equipment to Steele?

**A.** I don't know about that either. I don't think I could.

**Mr. Matthews:** Thank you very much.

**Mr. Kretsinger:** In that connection, right at that point, to tie it in, I would like to ask a question.

**Exam. Hanback:** All right.

**Further cross examination.**

**By Mr. Kretsinger:**

**Q.** I note on your emergency temporary authority that the basis of the grant was the strike at the Steele Canning Company and the T. A. was effective so long as the strike continued or for 30 days, whichever expired first.

**Exam. Hanback:** That is the emergency authority?

**Mr. Kretsinger:** The emergency authority.

**By Mr. Kretsinger:**

**Q.** Did you use that same basis for obtaining the 180-day temporary authority, the strike?

**The Witness:** Did we use it?

**Mr. Layne:** The answer is yes.

**A.** Yes.

[fol. 74] **By Mr. Kretsinger:**

**Q.** So the basis of the temporary authority was the strike?

**A.** Yes.

**Mr. Kretsinger:** That is all.

**Exam. Hanback:** Off the record.

(Discussion off the record.)

**Exam. Hanback:** On the record.

**Cross examination.**

**By Mr. Ryan:**

**Q.** Sir, do you propose to haul exempt commodities if this application is granted?

**A.** If it is practicable.

**Q.** For whom would you haul these exempt commodities?

**A.** Well, there are lots of people ship exempt commodities; that would be hard to say.

**Q.** For anyone who would offer you a load?

**A.** That is right.

**Exam. Hanback:** While you are on that subject, what equipment would you use? What equipment would you use? You are going to serve three shippers, what equipment would you use to haul exempt commodities? You are serving these three shippers under contract.

**The Witness:** On the return haul.

**Exam. Hanback:** He isn't referring to any return haul.

**The Witness:** No, I have no intention of hauling exempt commodities outside of unless they are going back.

[fol. 75] **Exam. Hanback:** Going back from where?

**The Witness:** From wherever the truck is to Springdale, Arkansas.

**By Mr. Ryan:**

**Q.** You don't feel that that would interfere? Let's just suppose the return haul, you don't think that would interfere with the exclusive use of these three shippers?

**A.** No.

**Q.** What other supplies and materials do you propose to carry on the return haul?

**A.** It is all in there.

**Q.** It is a little vague.

**Exam. Hanback:** I think that will have to come out through the shipper witness.

**Mr. Ryan:** All right. Then the application would be limited to what the shipper witness would say he had to haul.

**Exam. Hanback:** I assume so.

**Mr. Ryan:** I have no further questions.

**Cross examination.**

**By Mr. Durden:**

**Q.** Mr. Reddish, with respect to load 15 on Exhibit 6, page 1, I didn't quite hear your answer to one of the other counsel's questions. Do you hold any intrastate authority from the State of Arkansas?

**A.** I don't.

**Q.** Have you filed an application?

**A.** Yes.

[fol. 76] **Q.** When? You don't hold any operating rights under the Arkansas Commerce Commission at present, is that right?

**A.** No; that is right.

**Q.** I understood you had been engaged in intrastate commerce, is that correct?

**A.** One load.

**Q.** Is that the only load that you have hauled?

**A.** I didn't go over them all to see.

**Q.** Didn't you know that you were in violation of the Arkansas law when you moved that shipment?

**The Witness:** Is that the argument here today?

**Mr. Layne:** Answer him, you did know or you did not know.

**A.** Yes.

**By Mr. Durden:**

**Q.** You knew that you were in violation of the Arkansas law, sir?

**A.** Yes. I don't—

**Exam. Hanback:** Just a minute. He didn't finish his answer.

**Mr. Durden:** He said yes. I thought he had finished his answer.

**Exam. Hanback:** Do you have something else to state, Mr. Witness?

**A.** (Continuing) At that time I was not in the office, at the time this load was moved we had a death in the family and I was not there.

**Exam. Hanback:** Did you understand his answer?  
**[fol. 77] Mr. Durden:** I heard what he said.

**By Mr. Durden:**

**Q.** Have you moved any shipments in interstate commerce when you were there or whether you were there or not there?

**A.** There is none on here.

**Q.** There is none on here, I see that, but have you moved any?

**A.** No.

**Q.** With respect to load No. 16, Mr. Reddish, it shows on there Fort Smith, Arkansas, being the origin point, and Richmond, Virginia, the destination point. Who was the shipper in that case?

**A.** The Steele Canning Company.

**Q.** The Steele Canning Company?

**A.** That is right.

**Q.** Do they have a plant at Fort Smith?

**A.** They load merchandise at Fort Smith.

**Q.** They load merchandise?

**A.** That is right.

**Q.** Do they have a plant at Fort Smith?

**A.** I don't know all the particulars of their business.

**Q.** Do they have a plant in Westville, Oklahoma?

**A.** There is a loading place there.

**Q.** I asked you if they have a plant in Westville.

**A.** I don't know who owns the plant.

**Q.** You don't know?

**[fol. 78] A.** No.

**Mr. Durden:** That is all I have at the moment.

**Cross examination.**

**By Mr. Eyster:**

**Q.** One question for clarification on Exhibit No. 1. In answer to Mr. Bazelon's question relative to the commercial zone of Chicago, I believe the answer was that the Indiana points were not exempt, is that correct?

**A.** Yes.

**Q.** Does that same apply to other points within these commercial zones of Chicago, St. Louis, or other points within the same state, is that correct?

**A.** That is correct.

**Q.** For instance, in Chicago, the Chicago Commercial Zone is quite large and includes very many, many points other than Chicago. Are those exempt or is authority asked for those points?

**A.** They are not exempt.

**Exam. Hanback:** As I understand the amendment, take Chicago, for instance, the city limits of Chicago would be points within the city limits that would be—

**Mr. Eyster:** That would be Chicago proper only. Chicago proper is the only exclusion. Just for clarification.

Thank you.

**Mr. Prestridge:** I have no questions.

#### Cross examination.

[fol. 79]

By Mr. Jones:

**Q.** Mr. Reddish, will you turn to your Exhibit No. 6, please, the first page?

**A.** The first page?

**Q.** Yes, sir. The first five loads are outbound shipments of canned goods?

**A.** That is right.

**Q.** The next four loads are inbound shipments of cans and lids?

**A.** Yes, sir.

**Q.** Are those return loads on four of the trucks that were used for the outbound shipments?

**A.** That is right.

**Q.** Which particular four trucks were used on the inbound shipment represented by load numbers out of the first five?

**A.** That would be the first one, the second one, the third one, and the fifth one.

**Q.** How far is Springdale, Arkansas, from Bellefontaine, Ohio?

**A.** Oh, it is 750 miles, approximately.



Q. If you will turn to page number 5 of Exhibit 6, beginning with load number 99, on July 12, the next nine loads were all loaded on the same day, were they not, July 12?

A. Right.

Q. And was all of your equipment occupied, then, on that day, those nine loads?

A. I didn't understand the question.

Mr. Jones: Will you read it to him, please, Miss Reporter.

[fol. 80] (Question read.)

A. Yes.

By Mr. Jones:

Q. The next six loads were return movements ~~from~~ Ohio, Illinois, and Indiana, all being loaded on July 14, is that correct?

A. That is correct.

Q. And were those return loads for six pieces of equipment which were loaded outbound on July 12?

A. Yes.

Q. Which particular six pieces of equipment were used on the return movement?

A. You mean from which outbound loads?

Q. Yes, sir, referring to outbound loads.

A. Well, it would be 102—pretty hard to tell. It would be 104, 105, and 107, and 103, I guess.

Q. Turning to 103, was the first drop-off at Henderson, Kentucky?

A. Yes.

Q. And are the other drop-offs in the same order as shown on your exhibit?

A. That is right.

Q. What time did you leave Lowell, Arkansas, or Springdale, whichever may have been the origin point, was 103, the time of day?

A. Did I leave?

[fol. 81] Q. The truck leave.

A. I don't know now, that is last month.

Q. What time do you ordinarily?

A. They would leave in the afternoon for Henderson, Kentucky, two or three o'clock.

Q. And that truck makes drop-offs at Henderson, Kentucky, at Evansville, Indiana, Eldorado, Illinois, and Paducah, Kentucky, and then went to some point in Ohio, Illinois, or Indiana, and loaded with a load of canned goods sometime the second day?

A. That is cans and lids.

Q. Pardon?

A. That is cans and lids you are referring to?

Q. Cans and lids, yes. Is that your statement?

A. No; I wouldn't say they done that. But then I couldn't go back and see what they done without having the books showing how they went.

Q. What do you mean they didn't do that, you mean they didn't load on the 14th or that particular truck didn't load inbound?

A. That particular truck might not have loaded, I don't know.

Q. Which truck did load for return, then, if it wasn't 103?

A. All I can say is if he loaded he went from Paducah to Henderson and unloaded instead of from Henderson to Paducah and went to Elwood, Indiana. That is the only answer I can give you on it without going into the office and seeing exactly who it was and where they went and how they went.

[fol. 82] Q. Referring to your load 107, can you give us the drop-offs, the order in which they were made?

A. He went to Friedport, Green Bay, and Kenosha.

Q. And then where did it go to pick up a load for inbound?

A. Chicago.

Q. Do you know how many miles that truck traveled in negotiating that particular—

A. Trip.

Q. (Continuing) —delivery?

A. Oh, I'd say 12 to 13 hundred miles.

Q. Is it your statement that that particular truck negotiated that distance and made those three drop-offs and loaded in Illinois, Indiana, Ohio, on the second day?

A. No, I wouldn't say that.

Q. Well, what did it do?

A. Which truck? If you are referring to 107—

Q. Are you referring to 107?

A. (Continuing) —he loaded at Chicago?

Q. 107?

A. He loaded at Chicago, which is a very short distance from Kenosha, Wisconsin.

Q. Is it your statement that that truck leaving Lowell, Arkansas, in the afternoon made those three drop-offs in Wisconsin and Illinois, then went to Chicago and loaded with cans and lids the second day?

[fol. 83] A. No.

Q. What did it do?

A. He might have been the next day getting it done for all I can tell now.

Q. You mean he didn't load it on the 14th?

A. He loaded on the 14th.

Q. What do you mean, then, when you say he might have done it the next day?

A. He might not have got it all unloaded in one day. I don't know if he did or not now. That was several days ago.

Q. Is the exhibit correct or isn't it? That is what I am getting at.

A. The exhibit is correct, yes.

Q. Then if the exhibit is correct—

A. (Interrupting) But as far as the time, the exact time, that that truck arrived up there is concerned, I couldn't tell you that.

Q. I don't think we have discussed the particular time the truck arrived anywhere. I simply asked you if the statement that the truck hauling load 107 made drop-offs at the two Wisconsin points and the Illinois points.

A. Yes.

Q. And then proceeded to Chicago?

A. Yes.

Q. And loaded out by the second day?

[fol. 84] A. Yes. He probably done it the same day.

Q. You mean he probably left Springdale or Lowell on the afternoon of the 12th and made those three deliveries and loaded the same day?

A. He could have. It is possible.

Q. And drove 1,300 miles?

A. That is up there and back I was referring to, round-trip; that is what you asked.

Q. That includes from Chicago back to Springdale?

A. No.

Q. I am afraid you have me a little bit confused. What is the mileage that would be involved from Lowell, Arkansas, or Springdale, Arkansas, to Kenosha, Wisconsin, Green Bay, Wisconsin, Freeport, Illinois, and then to Chicago?

A. I would have to have a road map to figure all that out. I don't know.

Q. But it is still your statement that that truck made those three deliveries and then went to Chicago and loaded by the second day?

A. He could have. Whether he did or not I don't know.

Q. Your exhibit says that he did?

A. No, it doesn't.

Q. What does it say?

A. Or does it? No. He loaded in Chicago on the 14th and he loaded in Springdale on the 12th.

[fol. 85] Q. That is what your exhibit says and is that what he did?

A. Yes.

Q. From what company in Chicago did he load the cans?

A. Continental Can Company.

Q. Pardon?

A. Continental Can Company.

Q. Are they open for loading on Saturday?

A. They load late at night. Whether they load on Saturday or not I don't know. They load late at night.

Q. The 14th was a Saturday.

A. Evidently they did, then, if the 14th was Saturday.

Q. It appears that the 12th was on Saturday. When did you unload these drop-offs at the Wisconsin and Illinois points?

A. He would have unloaded them Monday, then, if the 12th was Saturday.

Q. So on Monday he made the three drop-off shipments at the two points in Wisconsin and then one in Illinois and then went to Chicago and loaded the cans and lids?

A. That is right. If Monday was the 14th, that is what he done.

Q. Do you have any rules and regulations as to the speed at which your equipment is operated?

A. Yes.

Q. What is it?

A. Fifty miles an hour.

[fol. 86] Q. How much?

A. Fifty miles an hour.

Q. Do you know whether or not that speed would have to be exceeded in making the trips in which we have just been discussing?

A. It wouldn't.

Q. Can you make that statement with assurance without being able to state into the record the mileage which is involved?

A. Run over that once again.

(Question read.)

A. I haven't figured it out, but then I believe I could.

Mr. Jones: That is all of my cross-examination.

Cross examination.

By Mr. Gunn:

Q. Mr. Reddish, you had stated that you are going to purchase some new tractors, is that correct?

A. That is correct.

Q. And you had made contract for the purchase of those new tractors?

A. Yes.

Q. Would you refer to your Exhibit No. 5, please?

A. Yes, sir.

Q. Does your financial statement, Exhibit No. 5, show the planned expenditure for these new vehicles?

A. Show it?

Q. Yes.

[fol. 87] A. No.

Q. When do you plan on making these purchases?

A. The first of the month if they are delivered on time.

Q. So then your financial statement would be different somewhat at the first of the month, would it not be, to a considerable extent, would it not?

A. Not a whole lot.

Q. These tractors are not expensive?

A. Well, yes, but it would balance out the same. The assets would be higher and so would the accounts payable.

Q. Yes, but the figures would vary, would they not, from what are here?

A. Oh, yes, some.

Q. Mr. Reddish, where is your equipment stationed?

A. Stationed?

Q. Yes, sir.

A. Springdale, Arkansas.

Q. Pardon?

A. Springdale, Arkansas.

Q. That is your home?

A. Yes, sir.

Q. And your equipment, that is more or less the homing point, is that correct?

A. That is correct.

Q. Now, I note from your Exhibit No. 6 that with the [fol. 88] exception of the destination points, Lowell, Arkansas, Springdale, Arkansas, and Westville, Oklahoma, that you do not make any return hauls from any of the other origin points, is that correct? You do not make any return hauls from any of the origin points listed on Exhibit No. 6, with the exception of Lowell, Arkansas, Springdale, Arkansas, and Westville, Oklahoma?

A. Any return hauls?

Q. Yes, sir.

A. To any other place besides those?

Q. No, sir, with the exception of those three towns, none of the origin points, you do not make any return hauls from any of the origin points listed in Exhibit 6, according to this exhibit, am I not correct?

A. I don't understand your question.

Q. All right. You have listed—I think I had better rephrase that. Let me ask it this way:

Do you have any return hauls from any of your destination points back to Lowell, Springdale, or Westville, Oklahoma?

A. Any of them?

Q. Yes.

A. Yes, part of them.

Q. On hour back hauls that you list for cans and lids and so forth, are those special hauls that you make, say, like to Elwood, Indiana, do you go up empty?

A. No.

[fol. 89] Q. How do you handle an arrangement like that, then, say, you are bringing back some lids from Elwood, Indiana, to Springdale, Arkansas, is that part of a continuous haul, you have a movement up some place?

A. Why, yes.

Q. In other words, you don't go up empty to any point to make a load to, say, Lowell, Springdale, or Westville, Oklahoma?

A. Well, so far it hasn't been necessary.

Q. If you were called upon to move such a load would you do so?

A. Yes.

Q. Have you made a study to see whether that would be profitable for you?

A. That particular trip, no.

Q. You have not made any investigation?

A. Because it never has arose.

Q. I see. Now, when you were under contract with Steele Canning Company was your equipment in use quite often?

A. They used it every day.

Q. And could you say that your business was good?

A. Well, it was all right. I wouldn't—

Exam. Hanback: Wouldn't what? Finish your answer.

A. (Continuing) I wouldn't say that it was real good, but it was all right.

By Mr. Gunn:

Q. Your equipment was in use quite often?

A. Yes.

[fol. 90] Q. And you would naturally expect to pick up additional business by signing contracts with Cain Canning Company and Keystone Canning Company, would you not?



A. Yes.

Q. Do you know whether in any of these proposed contracts there is a provision that permits cancellation in the event service is not satisfactory?

A. There is no provision like that.

Q. But you have seen the contracts as they are drawn up, is that correct?

A. Yes.

Q. One other point. Your drivers, you took some drivers from Steele, did you not, when they went on strike?

A. They come and wanted a job.

Q. Were they union men when they were working for Steele?

A. No.

Q. Mr. Reddish, most of your work is with canned goods, is it not?

A. Yes.

Q. Is that a seasonal work, canning season, just goes certain months of the year, that is, it is just good certain months of the year?

A. No.

Q. They do not?

A. I don't know all about the canning business, I couldn't [fol. 91] tell you about that.

Q. So you do not know whether it is seasonal business or not?

A. No.

Mr. Gunn: I have no further questions.

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

We will recess until 2 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2 o'clock of the same day.)

[fol. 92]

## AFTERNOON SESSION

2:00 p.m.

**Exam. Hanback:** The hearing is resumed.  
Is there any additional cross examination?

(No response.)

**Exam. Hanback:** It is my understanding that all opposing counsel have examined the temporary authority recently issued to the applicant. They have a copy here available for anyone who wishes to examine it. If anyone wishes to cross-examine concerning that, they should do so at this time.

It is also apparent that this case can't be completed today and it will have to be continued to a time and place hereinafter fixed. It is understood that the applicant will have available at that time copies of the temporary authority that was issued yesterday, I believe, and a corrected order.

Is that correct?

**Mr. Layne:** That is correct.

**Exam. Hanback:** Is there any additional cross-examination?

**Mr. Gunn:** Yes.

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**E. L. REDDISH** resumed his testimony as follows:

Cross examination (continued).

By Mr. Gunn:

**Q.** Mr. Reddish, referring again to your Exhibit No. 6, you have listed on your Exhibit No. 6 the destination points, right?

**A.** The one where we haul loads to?

[fol. 93] **Q.** Yes, that is correct.

**A.** Yes, that is destination points.

**Q.** You have listed there your destination points?

**A.** Yes.

**Q.** You have no shipments back from those destination points listed, do you?

A. No.

Q. Do you haul anything back to your origin points?

A. Anything?

Q. Yes, sir, from, that is, destination points.

A. No, not at the time being. I only have authority to haul tin cans and lids and boxes, and they don't originate at most of the unloading places.

Q. You stated before that you would take an empty truck to some point, if you are granted your authority to haul the cans and lids back to an origin point or to a point of destination, did you not?

A. Yes, if it was necessary.

Q. And if you were short on equipment what arrangements would you make to make such hauls, would you require your shipper to wait until such time as you had equipment available?

A. I haven't had that to happen, I don't know.

Q. In the event it should happen, what would you do?

A. I hadn't decided on that.

Q. I see. It is possible, then, that you might tell your [fol. 94] shipper that you could not handle it?

A. No; you can't tell in the future whether that would happen or not. How do I know that would happen?

Q. You are a business man, you would naturally plan on certain contingencies happening, would you not?

A. Yes.

Q. In which case, if you didn't have equipment available, what would you tell your shipper, would you tell him he would have to wait until such time as you had the equipment or would you tell him to have somebody else haul it for him?

A. Well, I would make an attempt to get the equipment.

Q. I see. But you would have to tell him to wait until you got the equipment, would you not?

A. No.

Q. Then your alternative would be to have somebody else haul it for him, would that not be so?

A. You can always get equipment.

Mr. Gunn: I have no further questions.

Exam. Hanback: Is there any redirect?

Mr. Layne: Yes, sir.

Exam. Hanback: Is there any further cross-examination of this witness?

(No response.)

Exam. Hanback: Is there any redirect?

Mr. Layne: Yes, sir.

[fol. 95] Redirect examination.

By Mr. Layne:

Q. Mr. Reddish, in connection with the inquiry about the form and content of your freight bills, how long have you been in operation as a carrier in interstate commerce under the jurisdiction of the Interstate Commerce Commission?

A. A little over 30 days, June 13.

Q. Was it necessary for you to prepare all of your forms and all of your documents quickly, promptly, upon the Commission's grant of emergency authority?

A. Yes, it was, in one day.

Q. You didn't have any forms or documents prior to that time for movement in interstate commerce, freight bills, for example?

A. No, I didn't.

Q. You were also asked on cross-examination whether you were prepared or would be prepared to buy additional equipment, that is to say, additional motor carrier equipment, additional tractors and additional semi-trailers in the event the authority here in hearing should be granted to you, would you be prepared to buy additional equipment beyond that that is shown on Exhibit No. 4 and beyond that which you have presently contracted to trade in and purchase new?

A. Yes.

Mr. Matthews: I object to that question, sir. I think the balance sheet shows on its face the financial fitness of this particular applicant. I think his ability to buy more equipment [fol. 96] ment is something for the Commission to decide. His desire, I have no objection to that question, but his ability I do object to.

I ask that the answer be stricken.

Mr. Layne: Do you want me to answer that objection? The first answer to the objection is that obviously this man's statement of his capacity is of interest to the Commission. While it is true that the Commission may arrive at an appropriate time any conclusions that they want from the facts here of record, I also have the right to ask this witness what his opinion is of his ability and then to establish it on fact. It was a matter gone into on cross-examination.

Exam. Hanback: The objection is overruled.

Do you understand the question?

Mr. Layne: He answered it.

Exam. Hanback: What was your answer?

The Witness: Yes, I could buy any amount of equipment, any reasonable amount that would be required to haul that stuff.

By Mr. Layne:

Q. Have you, in fact, had discussions and investigations as to making arrangements to purchase additional equipment and additional trailers in the event the Commission should grant operating authority to you?

A. Yes.

Q. Do you find that you can buy additional motor carrier equipment, including additional tractors and additional [fol. 97] trailers with little or no down payment?

A. Yes.

Q. And that is on the basis of your existing balance sheet and your existing operations and credit standing?

A. Yes.

Q. Is the same thing true with respect to trailers?

Mr. Kretsinger: Mr. Examiner, is this still direct examination?

Mr. Layne: Redirect.

Mr. Kretsinger: I want to object to these leading questions. Counsel has very ably led the witness along as to what he wants to put in the record. I think the witness should answer from his own knowledge.

Exam. Hanback: Objection sustained.

By Mr. Layne:

Q. Have you had any consultation with respect to trailers?

A. I have talked to about five trailer companies and they've all got hundreds of them that I could get in a few days' time.

Q. Do they require down payment?

A. Most of them, but I can make the down payments on any amount that would be necessary to move this merchandise.

Q. You have been asked with respect to a movement, an intrastate movement, in the State of Arkansas. There was some question in your mind during the course of that examination as to whether you were in Springdale, Ar-[fol. 98] kansas, at the time of that particular transportation, that that particular transportation occurred that is shown on Exhibit No. 2. Where were you at the time that transportation occurred?

Mr. Bazelon: I object to that. It is immaterial where he was. It is the company that counts and the company that performed the transportation. He is not the whole company.

Mr. Layne: The question to which I am addressing myself, some counsel down the table there asked him whether he knew. I am trying to go into the question of whether he knew that this particular movement had taken place.

Mr. Gunn: He stated that he did know.

Exam. Hanback: The objection is overruled.

Can you identify the shipment more particularly?

Mr. Layne: All right, let's ask him.

By Mr. Layne:

Q. Can you identify that shipment?

A. Well, the one he was referring to is the Jonesboro shipment.

Exam. Hanback: What date?

The Witness: The 9th.

Mr. Layne: No. 15 on Exhibit No. 6.

Exam. Hanback: Is that right?

The Witness: No. 15, yes, that is right.

By Mr. Layne:

Q. Did you personally know that that shipment had taken place?

A. No, I didn't. That is what I couldn't figure out when I tried to answer the question awhile ago; I was trying to [fol. 99] think. I wasn't there at the time. I was in Springfield. My mother died—

Q. (Interrupting) You will have to keep your voice up. You were in Springfield, Missouri?

A. I sit up with her for a week and it took a week for the funeral, so I wasn't there at that time.

Q. Is it your purpose to carry on any unlawful operation in interstate or foreign commerce?

A. No.

Q. Had you instructed anyone, any attorney, to make appropriate application to the State of Arkansas for you upon receipt of operating authority from the Commission?

A. Yes.

Q. Did you instruct an attorney to do that?

A. Yes. And he contacted the state, and as far as I can find out we are clear in Arkansas. We have permits from every other state but Arkansas and they said wait until the I.C.C. made their decision.

Q. What attorney did you instruct to do that?

A. Jack Joyce.

Q. And Mr. Joyce is an attorney in Fayetteville, Arkansas?

A. Yes.

Mr. Layne: Those are all the questions I have on re-direct.

Exam. Hanback: Is there any further cross-examination.

Mr. Bazelon: Just one question.

[fol. 100] Recross examination.

By Mr. Bazelon:

Q. Did you say you were clear in all states?

A. That is right. We have run in all states.

Q. You didn't apply—did you apply for intrastate rights?

A. In Arkansas?

Q. Yes.



A. Yes, supposed to.

Q. But you are not clear in Arkansas to perform that operation, are you?

A. Yes.

Q. You have authority to perform intrastate operations in the State of Arkansas?

Exam. Hanback: He has applied.

A. We are allowed to operate until the hearing.

By Mr. Bazelon:

Q. In intrastate commerce?

A. That is what was in the application.

Exam. Hanback: You had better explain that, Mr. Counsel.

Mr. Layne: I will let Mr. Joyce explain it.

Mr. Joyce: A letter was written to the Arkansas Commerce Commission requesting that the authority as per the emergency and temporary application, authority from Arkansas be granted to conform to the application for temporary and emergency authority, and the Commission advised me that it would not be necessary to do so at this time but to wait until the outcome of the Interstate Commerce Commission.

[fol. 101] Mr. Bazelon: That is a conforming application?

Mr. Joyce: That is right.

Mr. Bazelon: That does not include intrastate operations in Arkansas, does it?

Mr. Joyce: We asked for what is in the temporary and emergency operation, which, of course, included intrastate activity.

Mr. Bazelon: But there is no authority been authorized?

Mr. Joyce: From Arkansas?

Mr. Bazelon: Yes.

Mr. Joyce: Only in so far as operating until the outcome of the Interstate Commerce Commission application.

Mr. Kretsinger: You do not have intrastate authority in any other state?

Mr. Joyce: No.

The Witness: Ah, Ah; Oklahoma reads that way.

Mr. Joyce: Oh, yes, in Oklahoma.

**Exam. Hanback:** Is that correct?

**The Witness:** Yes, sir, that is correct.

**Exam. Hanback:** Is there any further cross-examination?

(No response.)

**Exam. Hanback:** Off the record.

(Discussion off the record.)

**Exam. Hanback:** On the record.

**Mr. Reddish,** if you were granted the proposed authority, am I correct in assuming that you will not haul any traffic [fol. 102] for any other shipper, any shippers other than Steele Canning Company, Keystone Packing Company, and Cain Canning Company?

**The Witness:** That is correct.

**Exam. Hanback:** Under your authority you get from the Commission?

**The Witness:** Yes, sir, that is correct.

**Exam. Hanback:** And that will be performed under a continuing contract?

**The Witness:** Yes.

**Exam. Hanback:** Is it your purpose to dedicate any equipment to the exclusive use of any one of those three shippers or all of them?

**The Witness:** Yes.

**Exam. Hanback:** How will you perform that, how will it be dedicated?

**The Witness:** Well, they know where the trucks are all the time, they know where they go and when they will be back as well as I will, and they schedule their operation that way, they schedule their loads where they can load them out of their plant.

**Exam. Hanback:** You have at the present time about nine tractors and trailers, is that correct?

**The Witness:** Yes, sir.

**Exam. Hanback:** Is it your intention to dedicate any particular ones to a particular shipper as shown on Exhibit 4?

[fol. 103] **The Witness:** Well, between the three of them they would all be, between the three of them.

**Exam. Hanback:** What you have in mind is that this equipment will be alternated, one shipper might use this equipment one day and another shipper the next?

**The Witness:** Well, it would just be between the three shippers, yea, sir.

**Exam. Hanback:** You mentioned something about hauling exempt commodities on return trips back to perhaps Springdale.

**The Witness:** Springdale, to Springdale, yea.

**Exam. Hanback:** Would you haul any in any other direction if you had authority from the Interstate Commerce Commission, exempt commodities?

**The Witness:** No; just what would come back in there. They can a certain amount of stuff. I wouldn't have any reason to.

**Exam. Hanback:** The shipper wouldn't have exclusive use of that vehicle, would he, if you were using it to haul exempt commodities, would he?

**The Witness:** Back home?

**Exam. Hanback:** Yes.

**The Witness:** Yes, it would be coming right back to them.

**Exam. Hanback:** But you wouldn't be hauling it for any one of these three shippers, would you?

**The Witness:** Ninety-nine chances out of a hundred it would go to his canning factory.

**LAKE .... STARTS**

[fol. 104] **Exam. Hanback:** Who would pay the freight on those shipments, would it be one of these canning companies?

**The Witness:** Ordinarily whoever sold it to them.

**Exam. Hanback:** Any further questions of this witness?

**Mr. Kretsinger:** Yes, please.

**Recross examination.**

**By Mr. Kretsinger:**

**Q.** In connection with those exempt commodities, would those be transported in a trailer together with the other commodities that you have authority to haul under your permit?

**A.** Where they have labels to go back they would be.

Q. They would be combined with the shipments that you would handle under your permit?

A. Yes.

Q. So in the same trailer you would have the combination of commodities under your permit and exempt commodities?

A. Well, there wouldn't be 200 pounds.

Q. Even if it was 100 pounds, there would still be two types of shipments?

Mr. Layne: I want the record to be clear at this point before you go any further. This application covers request to move exempt commodities back on the same trailers, that is, commodities which are called exempt but which would not be because they would be mixed with such as labels on behalf of Steele Canning Company, the three canning companies that are named.

[fol. 105] Mr. Kretsinger: Take fresh vegetables, for example, would that be included?

Mr. Layne: Yes. It is specifically stated in the notice of hearing in this case it would be commodities, the materials and supplies included—would you like to see the Federal Register publication?

Mr. Kretsinger: I have it here.

Mr. Bazelon: What is Exhibit 1, then? I thought Exhibit 1 was the amendment to the application.

Mr. Layne: It is.

Mr. Bazelon: That reads "Canned goods and materials and supplies used in the manufacture of canned goods".

Mr. Layne: The canned goods includes the items that are canned.

Mr. Kretsinger: Show me where it says anything about the exempt commodities.

Mr. Layne: Doesn't it say such things as fruits and vegetables? Yes, it says right down there canned goods and materials and supplies used in the manufacture of canned goods such as sugar, salt, metal cans and lids, cardboard boxes, printed labels, fresh vegetables and fresh fruits from the above specified destination points to the above specified origin points, and I am reading from a copy of the Federal Register, which appears to be pub-

lished in the Federal Register on June 11, 1958, at page 4126.

[fol. 106] Mr. Kretsinger: It identifies the commodities specifically but it doesn't use any terminology "exempt commodities".

Mr. Layne: You are talking about fresh vegetables and fresh berries which are popularly referred to as exempt.

By Mr. Kretsinger:

Q. Let's just straighten out this intrastate situation in Oklahoma. As I understand it from one of your attorneys, since you stated on the record that you had intrastate rights in Oklahoma, I understand from him now that you do not have intrastate rights in Oklahoma but you do have a permit issued by the Oklahoma Commission which authorizes you to handle interstate traffic in the State of Oklahoma, is that it?

Mr. Joyce: Correct.

Mr. Kretsinger: So wherever the witness has stated that he has intrastate rights in any of these states involved, what he meant to say was that he had appropriate authority from the state commissions of those states to handle interstate traffic?

Mr. Joyce: Exactly.

By Mr. Kretsinger:

Q. In connection with the back-haul of these so-called exempt commodities, are those commodities which you buy and sell?

A. No. They are bought by the canning companies. They have a broker that does that, several of them.

Q. Do you deal with the broker?

A. I haul it for them.

[fol. 107] Q. For the broker?

A. Yes.

Q. The broker in those instances is the shipper?

A. Not ordinarily.

Q. Occasionally?

A. Occasionally. Is the shipper?

Q. Yes.

A. Well, they hire it hauled, put it that way.

Exam. Hanback: Who is "they"?

The Witness: The brokers.

A. (Continuing) But then they wouldn't be at the origin point. Ordinarily there is one in Springdale that handles most of that stuff.

By Mr. Kretsinger:

Q. In that connection, any contract that you entered into with any of these three canning companies that you named, would those contracts list the authorized items in your permit, also exempt commodities, that you would haul?

A. Oh, you would have to—

Mr. Layne: I don't understand what he is asking.

By Mr. Kretsinger:

Q. Counsel has brought attention to the Examiner and the record to the hearing notice in the Federal Register pertaining to such as salt, sugar, metal cans and lids, cardboard boxes, printed labels, fresh vegetables, and fresh fruits. Would your contract provide for the transportation of those commodities along with the specific [fol. 108] items of canned goods and lids and so forth.

Mr. Layne: It certainly would.

By Mr. Kretsinger:

Q. And your schedule of minimum rates would specify rates for all of those commodities?

Exam. Hanback: That is a question for counsel.

Mr. Layne: It certainly would. Mr. Kretsinger, it certainly would.

By Mr. Kretsinger:

Q. Do I understand, then, in addition to the transportation of those commodities under the contract and under your schedule of minimum rates and charges or the sched-

ule of rates attached to your contract that you would also handle exempt commodities for others?

A. Just the ones going into Springdale, into that area, purely as a back-haul.

Q. It would be a back-haul to Springfield—

A. (Interrupting) To Springdale.

Q. (Continuing) —Springdale for the three shippers named and others?

A. Yes.

Q. Whoever wanted it?

A. Yes.

Mr. Kretsinger: That is all.

Mr. Bazelon: I wonder if I might ask just one question.

Exam. Hanback: Proceed.

Further recross examination.

[fol. 109] By Mr. Bazelon:

Q. In the application you are asking for authority from Westville, Oklahoma, to points in Oklahoma. Is that intrastate movement?

A. You will have to ask him (indicating). Yes, it would be. It has not happened, but it would be.

By Mr. Bazelon:

Q. And the same is true of Arkansas?

A. From Westville, Oklahoma, no, it wouldn't be.

Mr. Layne: We can state now we don't expect the Interstate Commerce Commission to issue any intrastate commerce—

Mr. Bazelon (interrupting): So those movements are interstate, is that right?

Mr. Layne: That is true.

Exam. Hanback: If you were granted the authority you seek, is it your intention and do you anticipate that you will have occasion to deliver any of the three shippers' freight to a rail carrier?

The Witness: No—a rail carrier?

Exam. Hanback: Yes.



The Witness: No.

Exam. Hanback: Or to some other motor carrier for movement outside the state?

The Witness: No.

Exam. Hanback: You understand what I had in mind by asking that question?

The Witness: Interline.

[fol. 110] Mr. Layne: Mr. Examiner, I may say for him that we do not contemplate that there will be any movement in Arkansas which is delivered to another carrier for further movement beyond Arkansas, for example, or any movement in Oklahoma for delivery to a common carrier beyond Oklahoma, so it would make it an interstate transportation. We do not anticipate that.

Exam. Hanback: Are there any further questions of this witness?

(No response.)

Exam. Hanback: You are excused.

(Witness excused.)

#### OFFERS IN EVIDENCE

Mr. Layne: Mr. Examiner, I would like to offer in evidence Exhibits 2 through 6.

Mr. Harding: Just one moment. In connection with your last remarks, counsel, and in my reading of Exhibit 1, which is the amendment to the application, I presume it is erroneous in some respects.

Mr. Layne: It is not erroneous. It states just precisely what I want it to state. I did say that we are not seeking any intrastate authority from the Interstate Commerce Commission. I also said I can tell the Examiner now we did not anticipate any evidence which would show that this carrier intends to deliver as a contract carrier to another carrier for movement beyond the states of Oklahoma or Arkansas or any other state.

Exam. Hanback: Involved—

[fol. 111] Mr. Layne: Involved in this application.

Mr. Harding: I gather from your remarks you intend to leave it to the wisdom of the Examiner to straighten it out.

Mr. Layne: It has been my experience that the Commission usually straightens me out. No matter what I do, the Commission usually disposes of it.

I would like to call my next witness.

Exam. Hanback: Is there any objection to these exhibits?

(No response.)

Exam. Hanback: Applicant's Exhibits 2, 3, 4, 5, and 6 are received in evidence.

(Applicant's Exhibits Nos. 2, 3, 4, 5, and 6, Witness Reddish, were received in evidence.)

Mr. Jones: May I inquire of counsel here, would they be willing to stipulate that Rand McNally map may be used for computing distances?

Mr. Layne: There is no objection on the part of the applicant.

Exam. Hanback: Call your next witness.

Mr. Layne: I will call Mr. Walter Turnbow.

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WALTER TURNBOW was sworn and testified as follows:

Direct examination.

By Mr. Layne:

Q. Would you please state your name, address, and business affiliation for the record?

[fol. 112] A. Walter Turnbow, 708 Crouch Street, Springdale, Arkansas.

Q. With what company are you employed or associated?

A. I am vice-president and general manager of the Steele Canning Company in Springdale, Arkansas.

Q. As vice-president and general manager of the Steele Canning Company do you have general supervision of the operations of that company?

A. Yes, I do.

Q. How long have you been with Steele Canning Company?

A. This is my tenth year.

Q. What is the business of the Steele Canning Company?

A. To can fresh vegetables and fruits.

Q. When you say can fresh vegetables and fruits, can you tell me the fresh vegetables and fresh fruits that are canned by the Steele Canning Company?

A. Yes, I can. We can green beans, spinach, mustard and turnip greens, Swiss chard, kale, cauliflower, black eyed beans, Crowder peas, cream peas, various types of beans, Irish potatoes, sweet potatoes. I think that pretty generally covers it.

Mr. Ashton: Ochre?

The Witness: No ochre.

-By Mr. Layne:

Q. Do you can ochre?

A. No. Blackberries, boysenberries, and on occasion can strawberries, and tomatoes also. I am sorry, I left them out.

Q. Do you can any fruits other than what might be in [fol. 113] cluded in the berries?

A. We do not.

Q. What places or what place do you have a plant to can these vegetables and these berries?

A. The Steele Canning Company has a plant at Lowell, Arkansas.

Q. Where is Lowell, Arkansas, just for our benefit?

A. Lowell, Arkansas, is about midway between Rogers and Springdale, Arkansas. It is roughly a quarter of a mile off of Highway 71.

Q. Is that the only plant that is operated by Steele Canning Company?

A. That is the only plant operated by Steele Canning Company.

Q. Do you have in addition to the plant at Lowell, Arkansas, any warehouse?

A. Yes, we have warehouses in Springdale, Arkansas.

Q. Do you make shipments of the canned vegetables and canned berries from both the plant at Lowell, Arkansas, and the warehouse at Springdale, Arkansas?

A. We do.

Q. Do you also receive movements of inbound materials and supplies and vegetables and the like at both Lowell, Arkansas, and Springdale, Arkansas?

A. We do.

Q. We will identify the inbound materials in a few minutes. Can you tell us approximately, the approximate [fol. 114] volume of canned goods, that is, canned vegetables and canned berries, which will be produced at your plant at Lowell, Arkansas, during any period of a year, for example, a year or any other period of time?

A. Well, our pack varies a great deal with general crop conditions in our area. As a rule we will pack between, oh, 500,000 and perhaps 800,000 cases at our plant at Lowell, Arkansas.

Q. For the purpose of this hearing can you tell me, do you have a rough rule of thumb as to how many cases make a truckload?

A. We consider a thousand cases as a truckload. Now, it depends upon the size of the can involved. The most common size is a 303 can. A thousand cases of 303 canned goods will weigh approximately 30,000 pounds.

Q. In addition to the canned goods which are produced at your plant at Lowell, Arkansas, and shipped from Lowell and Springdale, do you also buy canned goods at any other point for shipment from some other point than Lowell and Springdale?

A. Yes, we do.

Q. What are those points?

A. We purchase canned goods from a packer in Westville, Oklahoma.

Exam. Hanback: Where?

The Witness: Westville, Oklahoma.

A. (Continuing) Another packer from Springdale, Arkansas; a packer in Fort Smith.

Q. What is the name of the packer?

[fol. 115] A. Baron Canning Company is the packing company in Westville, Oklahoma.

Cain Canning Company, Inc., is a packer in Springdale, Arkansas.

Keystone Packing Company in Fort Smith.

In addition to these canners—

**Q.** (Interrupting) Hold up. Now, as to the companies that you have identified, Cain Canning, Baron Canning Company, Keystone Packing Company, what proportion of their output do you buy, or their total production?

**Mr. Bazelon:** Objection. I am not sure he would know what proportion it would be. All he could say is what he buys unless he is connected with these other companies.

**By Mr. Layne:**

**Q.** Have you been doing business with these companies for a substantial period of time?

**A.** Yes, we have.

**Q.** Are you familiar with their plants?

**A.** Yes, I have been in their plants quite often.

**Q.** Have you examined the machinery and the equipment that they have?

**A.** I have not literally examined it. I have observed it on numerous occasions.

**Q.** Are you familiar with the capacity at their plants of their machinery?

**A.** Yes, I am.

[fol. 116] **Q.** Can you tell us or are you familiar with what that plant with that kind of machinery can produce?

**A.** Yes, I am.

**Q.** Are you also familiar with how much you buy from these particular companies?

**A.** Yes.

**Q.** Can you tell by knowing their maximum capacity in the amount of which you buy some approximate percentage of their total capacity that they produce by how much you buy from them?

**A.** I think I can give a fairly accurate estimate on it.

**Q.** Would you please tell me—

**Mr. Bazelon (interrupting):** I still renew the objection.

**Exam. Hanback:** The objection is sustained.

**By Mr. Layne:**

**Q.** Tell us, what is the volume of your purchases, for example, let's start with Cain Canning Company.

A. Again, it depends upon the crop year. We will purchase from four hundred to six hundred thousand cases from Cain Canning Company.

Q. What is the approximate volume you purchase from this Keystone Packing Company?

A. That volume will range from 300,000 to 500,000 cases a year.

Q. How much is your purchase from the Baron Canning Company?

A. That will be something like between, oh, 800,000 and 900,000 cases per year.

Q. How much do you purchase a year from the Spring-[fol. 117] dale Canning Company? Did you buy from the Springdale Canning Company?

A. I was going to mention Springdale Canning Company and you stopped me a minute ago. We also purchase canned goods from Springdale Canning Company. We will purchase something between five hundred and seven hundred thousand cases a year from that company.

Q. What are the items that you buy from Cain and Keystone and Springdale Canning Companies?

A. We buy many of the same items which Steele Canning Company also packs. We do not have the capacity at Steele Canning Company to supply our customers' needs, therefore it is necessary for us to buy these commodities from other canners.

Q. Do you buy from Cain Canning Company fresh vegetables, canned fresh vegetables?

A. We buy canned fresh vegetables.

Q. Do you buy any berries or fruits from Cain?

A. No, we do not buy berries and fruits from Cain.

Q. Do you buy the canned vegetables from Keystone?

A. Yes, we do.

Q. The same sort of vegetables that Steele Canning Company cans itself?

A. That is correct.

Q. Do you buy any berries or any fruits from Keystone?

A. No, we don't buy berries or fruits from Keystone.

Exam. Hanback: When you speak of berries and fruits [fol. 118] are you referring to canned goods?



Mr. Layne: Yes, canned berries or canned fruits from Keystone.

Exam. Hanback: You are not purchasing fresh goods?

Mr. Layne: No.

Exam. Hanback: You haven't gotten to that yet?

Mr. Layne: No, I hadn't gotten to that.

By Mr. Layne:

Q. We are talking about canned berries and canned fruits. Do you buy any of those from Cain or Keystone?

A. No.

Q. Do you buy from Springdale Canning Company the same sort of vegetables that Steele itself cans in its plant?

A. Yes, we do.

Q. That is canned vegetables. Now, let's turn to Baron Canning Company at Westville, Oklahoma. What sort of items do you purchase from Baron Canning Company?

A. We buy what in the canning industry is termed a dry line. That is a dry bean that is processed and canned. They are a strictly a dry line packer, and we buy this line from Baron Canning Company in order to round out the items that we offer for sale.

Q. Do I understand that the beans in the can are dry or are they, as we would know of them, for example, pork and beans and beans that are damp when you open the can?

A. They are pork and beans, red kidney beans, and items [fol. 119] of that nature.

Q. These purchases that you make from these particular plants, where do you take title to the goods?

A. We take title to the goods at the particular canner's plant.

Q. Do you transport the goods from these plants to your customers or do you arrange for the transportation of these goods from the plants to the locations of your customer?

A. We buy a great deal of merchandise which is delivered to our warehouse in Springdale or our plant at Lowell. We also load a great deal of merchandise at these plants that go directly to our customers.



**Q.** Are shipments made from Westville, Oklahoma, to your plant at Lowell?

**A.** Yes, sir.

**Q.** Are shipments made from Westville, Oklahoma, to your warehouse at Springdale, Arkansas?

**A.** Yes, they are.

**Q.** Are shipments also made and arranged for by you from Westville, Oklahoma, to the locations of the customers in the various states where you may have customers?

**A.** That is correct.

**Q.** Now, similarly in the case of Fort Smith, Arkansas, so far as this hearing is concerned, would shipments be made by you from Fort Smith, Arkansas, from the plant of Keystone Packing Company at Fort Smith, Arkansas, [fol. 120] direct to your customers located in the several states?

**A.** We have that happen quite often.

**Q.** Would shipments also be made by you and on your behalf from the plant of the Cain Canning Company at Springdale, Arkansas to your customers located in several states other than Arkansas?

**A.** Yes, sir.

**Q.** In the case of these shipments from your plant at Lowell, Arkansas, and your warehouse at Springdale, Arkansas, and to plants of these other companies at Springdale, Westville, Oklahoma, and Fort Smith, Arkansas, do you pay for the transportation? Do you pay the freight charges?

**Mr. Baselon:** Mr. Examiner, I am going to object to the leading questions. So far the counsel has been doing all the testifying and the witness has been saying yes or no. I think the questions should be asked so the witness does the testifying.

**Mr. Layne:** Mr. Examiner, that is not a leading question, whether he pays the transportation charges or not.

**Exam. Hanback:** I don't think he had so much reference to this particular question.

The objection is overruled, but try not to lead any more than you can help.

A. We pay the transportation charges when shipments are made from Keystone Packing Company to our customers.

By Mr. Layne:

Q. How about the case of Cain?

[fol. 121] A. In any cases referring to these canners where shipments are made direct from those canners to our place we pay the charges.

Q. Do you control the routing?

A. We control the routing.

Q. Do you select the carrier?

A. We select the carrier.

Q. With respect to the Springdale Canning Company, the Cain Canning Company, the Keystone Packing Company, and Baron Packing Company, in the event of shipments from their points are the shipments made from their plants or do they have warehouses?

A. They have warehouses connected with their plants.

Q. Well, let's take Cain. Would shipments by you from the Cain warehouses or plants take place at any point other than Springdale? I mean is the origin Springdale or some other place.

A. The origin is Springdale.

Q. And with the Springdale Canning Company would the origin be Springdale?

A. It would be Springdale.

Q. And Baron?

A. Westville.

Q. And Keystone Packing Company, where would be the origin point?

A. Fort Smith.

Q. Do you sell and distribute any products other than [fol. 122] the product which you buy from or produce yourself at Lowell or buy from the particular companies at Westville, Springdale, and Fort Smith?

A. We buy merchandise from practically every canner in the Ozark area at different times, depending upon our pack and whether we are in short supply or not. We also buy canned goods, such as corn, shoe string potatoes,

spaghetti, that we do not pack at all. We buy this merchandise, bring it in to our factory or our warehouse. We sell that merchandise in small orders and combine it with other items in loads going out.

Q. In the case of shoe string potatoes, do you bring those shoe string potatoes to Lowell or Springdale for distribution from those points?

Mr. Bazelon: Mr. Examiner, I assume we are doing some of this to speed this up.

Mr. Layne: Yes, that is right.

Mr. Bazelon: Why not ask him what he does instead of telling him what he does.

Mr. Layne: I am trying to get it quite clear here.

Mr. Bazelon: Sure; he can do it himself. Just ask him what he does with the shoe string potatoes that he is—

Exam. Hanback: Why do shoe string potatoes come into this?

Mr. Layne: Canned goods. We will show that.

Exam. Hanback: The objection is overruled.

I wish you would call these things canned so and so. We have some materials and supplies here that apparently [fol. 123] they are not canned, or not all of them, so let's try to keep this clear.

Mr. Layne: Let me go back and clarify a point before we reach this.

By Mr. Layne:

Q. With respect to the items you buy from Cain Canning Company, Springdale Canning Company, Keystone Packing Company, what are they? Are they canned?

A. All items that we buy for resale to our customers are canned goods. We sell to wholesalers, chains, and what-have-you. Those are canned goods that we refer to as the commodities that we sell.

Q. Are all the items you buy from Cain canned?

A. All items which we buy from Cain Canning Company are canned as well as these other canning companies.

Q. That includes Springdale, Baron, and Keystone?

A. That includes all of them.

Q. Do you buy other canned goods?

A. Yes, we buy other canned goods.

Q. What other canned goods do you buy?

A. We buy corn, canned corn, we buy canned spaghetti, we buy canned shoe string potatoes, we buy canned kraut.

Q. From what companies, at what locations, do you buy canned corn, canned spaghetti, canned kraut, and canned shoe string potatoes?

A. On this I think it will be simpler to ask that question [fol. 124] on the companies that we have bought those items from since the 1st of January of this year. We have purchased canned kraut from Chiocton Kraut Company, Chiocton, Wisconsin. We have purchased canned shoe string potatoes from Colorado Springs, Colorado. We have purchased corn from Tripoli, Iowa: that is canned corn. We have purchased canned spaghetti from Belleville, Illinois. Now, in addition to those items that I have mentioned that we buy and do not pack at all, I have a bunch of out-state packers that we have bought turnip greens—

Q. (Interrupting) Do you mean canned turnip greens?

A. Excuse me. I mean canned turnip greens, canned kale, canned spinach, canned black eyed peas from. We were on short supply on several of those items. We have purchased them out of Laurel, Mississippi, Muskogee, Oklahoma, Cumberland, Tennessee, Fredric, Wisconsin, to mention a few of them.

Q. Let's keep on going. Let's find out where else you buy these canned goods from. What are the other points you buy canned goods?

Mr. Harding: May I inquire, is this all since the first of the year?

The Witness: This is all since the first of the year. I have invoices showing dates of shipment. This has all occurred since January 1. The file was too large to bring it for a year back.

By Mr. Layne:

Q. Keep going; let's keep on going.

[fol. 125] A. Benton Harbor, Michigan, Gillette, Wisconsin. I think I mentioned Tripoli, Iowa. Muskogee, Okla-

homa. I believe that is all that I have here on those. I did not include in that the canned goods that we have bought from Haskell, Oklahoma, and Alma, Arkansas, and Fort Smith, Arkansas, from competitors who have not been mentioned yet in this discussion.

Q. Do you buy anything from any point in Texas?

A. On occasion we do buy cut green beans out of the Rio Grande Valley.

Q. Are you speaking of canned cut green beans?

A. I am speaking of canned cut green beans.

Q. All of this canned goods that you have referred to that you buy at these various locations, where does it go?

A. It comes into either Spingdale or Lowell.

Q. Can you give us some estimate or some figures as to the volume of these canned goods that you buy at these various points and move to Lowell or Springdale?

A. Well, since the first of the year we have purchased approximately thirty truckloads of spaghetti out of Belleville, Illinois, something like 30,000 cases. We have purchased approximately 3,000 cases of corn. We have purchased approximately 2,500 cases of shoe string potatoes. We have purchased approximately 3,000 cases of kraut. These are all from the points that I mentioned here a minute ago.

I will be glad to rename these points, if you would like, [fol. 126] Mr. Examiner.

Exam. Hanback: No.

A. (Continuing) We have purchased around 5,000 cases of canned greens, which would include both turnip, mustard, and kale. And on green beans—

Exam. Hanback: Canned?

A. (Continuing) Canned, excuse me.

—something around four to five thousand cases.

By Mr. Layne:

Q. Does the production or volume of production at your plant have anything to do with the amount or times at which you would buy from other locations and bring these canned goods to Lowell?

A. It very definitely does.



**Q.** What connection does it have?

**A.** Any time that we have a short pack it is necessary for us to go out and locate merchandise to supply our customers. We have found that since the majority of our customers have gone to an I.B.M. machine system that once a supplier is taken off that I.B.M. system it is very difficult for him to get back on it, therefore, we cannot afford to be out of merchandise to our regular customers.

**Q.** And it is when you are out that you purchase from these other places?

**A.** It is when we are out or in short supply.

**Q.** What do you do when you are out or in short supply, [fol. 127] how is that arranged, what kind of arrangements do you make and what do you do?

**A.** Are you referring to how do we locate this merchandise?

**Q.** Yes, how do you locate it and how do you buy it.

**A.** Well, we have brokers in most of the major cities in the United States, and in talking to these brokers on the telephone we inquire about sources that they know of about these various items that we are looking for. If we are not able to locate the merchandise we want in that way, we pick up our canner directory, which has all of the canners in this country listed. We check to see if the people are reliable. We call the canners any place we feel like we might be able to located the merchandise and see if we can buy it. We have the canner submit samples to us. If they are satisfactory, we buy the merchandise and bring it in.

**Q.** What are your sales arrangements? How do you sell your products?

**A.** All of our merchandise is sold through food brokers to wholesalers, chain stores, and the larger super markets.

**Q.** Are they sold under your label or under some other label?

**A.** We sell merchandise both under our label and under our customer's labels.

**Q.** What is the proportion of sale as between your label and customer's label?

**A.** There is roughly 70 per cent of our merchandise that [fol. 128] is sold under customer labels; the remaining 30 per cent is sold under our own label.

**Q.** What are your customers? Who does eventually buy from these food brokers who represent you, what sort of customers do you have?

**A.** They are wholesalers, chains, and super markets.

**Q.** And what is the volume in which they buy at any one time?

**A.** The majority of our customers, roughly 80 per cent of them, buy in orders from 3,000 to 10,000 pounds per order. Three thousand pounds will represent a hundred cases. We hold our minimum to a hundred case shipment.

**Q.** On these canned goods do you arrange for the transportation to your customer?

**A.** It is necessary for us to arrange for the transportation to our customers. The customers who have their own trucks to pick up merchandise are very, very few, and the distance involved between the market where we sell our canned goods and our plant would be prohibitive for a wholesaler to pick up in our area, at least it would be prohibitive for most wholesalers.

**Q.** Where do you have customers located that you are currently selling for canned goods? In answering that question I would like to refer you to Exhibit No. 3, which has previously been received in this proceeding.

**A.** We have customers located in 33 states. The towns in those states where we have customers on our active shipping [fol. 129] list, all customers listed in this exhibit have been shipped during this year.

**Q.** This exhibit is Exhibit No. 3?

**A.** This exhibit is Exhibit No. 3.

**Q.** Does Exhibit No. 3 list locations where shipments are delivered?

**A.** It does indicate locations where shipments are delivered to our customers.

**Q.** Did you, as a matter of fact, Mr. Turnbow, did you supply that list to Mr. Reddish in connection with his applications for emergency operating authority?

**A.** Yes, sir, I did supply this list to Mr. Reddish.

**Q.** Since supplying that list have you customers located in any cities that are not on Exhibit No. 3?

**A.** Yes; our brokers have a standing way, thank goodness, of expanding their operations. - We pick up a new cus-



tomer and a new town quite often. I notice since this list was made up we have had four towns in particular where we have developed new customers. One of those towns was Mount Vernon, Alabama; another one was Urbana, Ohio; another was Kearney, New Jersey; and the other one was Williamsburg, Virginia. Now, there has been something like, oh, something like a month since this list was made up, and that is the normal process, to add customers regularly to our list.

Another thing that happens to us quite often is that we [fol. 130] have a wholesaler located in one town, he will have exhausted his warehouse space or decided that he wants to build a new warehouse and he may located in a neighboring town that is more centrally located in reference to his customers. Therefore, it often occurs that we are shipping an old customer to a new location.

Q. Is the small volume shipment to a particular customer a factor in the conduct of your business?

A. We have built our business on the small customers. We have found that the small customers buy regularly. We feel like that they are one of the best sources for us over the years. I mentioned here a few minutes ago something about an I.B.M. machine. Even the larger customers that we have have all gone on an I.B.M. system and they buy a ten days' supply where ten years ago they'd buy a truck-load. The wholesalers seem to have come to the conclusion that they must work on a ten-day supply on canned goods. That way they have their count in the ten-day period and they can operate on the canner's money. We have found out that our competition is all doing that. If we are to stay in business we have to give the people service for a ten-day turn-over and keep the supply in there; if we don't, they turn to our competitors.

Q. Are your customers of sufficient size to have warehouse space?

A. A good percentage of these customers neither have the [fol. 131] warehouse space nor the financial backing to stock a large amount of the merchandise that we supply.

Q. How do you receive orders from your customers?

A. We don't receive many orders directly from cus-

tomers. Our orders come from the brokers who are working in the different territories.

Q. How do you receive those?

A. We receive the largest amount of those orders by telephone. They are usually confirmed later by letter or by order. We also receive some orders through regular mail, others by wire.

Q. On the receipt of orders do you also receive specification as to day and time of delivery?

A. We do. Usually have the times of delivery specified on orders. This business is getting more complicated all the time. We have some wholesalers that will not receive on Monday; we have other wholesalers that will not receive on Friday; we have some wholesalers that will not receive in the morning; we have others that will not receive in the afternoon. We have some who quit receiving at 2 o'clock in the afternoon. We have some that will receive on perhaps Monday, Wednesday, and Friday; others that will receive the first three days of the week. We have found out that we have to cater to these whims of our customers because they have set up their work forces to carry this load. We also have some customers who start their operations at 4 o'clock in the morning for receiving. They receive from 4 to 8 [fol. 132] o'clock in the morning. After 8 o'clock in the morning they work on orders going out to their own customers.

Q. Is it necessary to give your customers this kind of service?

A. It is necessary to give the customers this kind of service if we are going to maintain the customers. Our customers are operating under a private carriage system and supply this type of service.

Q. Is speed in transportation from the time it leaves your plant or leaves the shipping point to receipt by the shipper any factor in the sale of your commodity?

A. Time is a very important factor. As I mentioned before, these people are working on a ten-day turn-over. We have literally hundreds of these little orders, ranging from 3,000 pounds to 10,000 pounds that have to be consolidated into loads. Oftentimes they are in neighboring towns but sometimes they are in different states, hundreds of miles

apart, but yet in transit to the final destination. When these people are working on a ten-day turn-over, we can't hold an order after we receive it for any length of time. We must get that order in. If we can't, they are out of merchandise; they are marking off of their own orders to their customers; they are looking for someone who will get the merchandise in there when they need it.

Q. Do your customers also have specials and sales of the commodities—

Mr. Kretsinger: He is getting back into this leading [fol. 133] questioning again.

Counsel, I know you are trying not to do it, but it is awful easy to get into.

Mr. Layne: If you want me to have nothing but just a long statement from the witness, I am sure he is perfectly capable of doing it. I am trying to shorten the examination up. I don't want to lead him. But the witness is very capable of taking care of this situation without my help.

Mr. Kretsinger: That is the reason I made the objection.

Mr. Matthews: I have a further objection.

Are you withdrawing that question?

Mr. Layne: Yes, I will withdraw that one. You can wait for the next one to object.

By Mr. Layne:

Q. Are there any other conditions which require special transportation service?

A. Yes.

Q. What are they?

A. Oftentimes we have customers—

Mr. Matthews (interrupting): That is what I am objecting to. We have had, I believe, about enough testimony from this witness on what his customers do. What the customers of this witness do, they should be brought in to tell that. I am objecting to what his customers do. I don't mind his talking about what he does. His customers, what they do, that is hearsay, and I object to it.

[fol. 134] Mr. Kretsinger: I join.

Mr. Bazelon: I join in that objection.

Exam. Hanback: The objection is sustained.

By Mr. Layne:

Q. Are there special requests made on you by your customers to receive merchandise at particular times and over particular periods?

Mr. Kretsinger: You are going right back into it again.

Mr. Layne: If we are going to have that kind of business where he can't testify about that, then we are going to get stuck on the question of what is a leading question. I am willing to go along but that is not a leading question. All right, let's get stuck on it, that is not a leading question in my opinion.

Mr. Kretsinger: I will object to it as leading and suggestive.

Exam. Hanback: The objection is sustained.

Mr. Layne: Let's go at it about this way:

By Mr. Layne:

Q. Do your customers make special requests? Are special requests made on you?

A. We have special requests made quite often.

Q. What is the nature of the special requests?

Mr. Matthews: That goes back to my objection. If his customers have particular requests they should be in here to testify about them.

Exam. Hanback: He can testify.

[fol. 135] A. We have requests made of us to deliver merchandise at specific times. Oftentimes these requests are made on extremely short notice. If I may give an example on this, it is very likely that our office may have a request by phone today, which is Wednesday, for a specific order to be delivered in Chicago on Friday. It is necessary to deliver that merchandise at the time requested or lose the order.

By Mr. Layne:

Q. With respect to the items that are custom labeled, do you make deliveries of customer labeled items?

A. We make delivery of custom labeled items; and by customer labeled items I mean that we put labels on those

items that we buy from a particular wholesaler. It is also very common for us to combine those custom label items with our own merchandise. Now, I am not sure that I understood your question completely on your wording. By custom label are you talking about merchandise that we label under a particular label or are you referring to merchandise labeled for particular orders?

Q. I was referring to merchandise bearing a customer's label.

A. O.K. All items which we ship are labeled at the time of shipment and not at the time of pack.

Q. Do you receive any special requests for urgent service where a customer states that he is out of the commodity?

A. That is a very common request, particularly on a small order. It is no problem to get a truckload order to a customer. If that customer has 3,000 pounds, it is necessary to [fol. 136] work out a load for his territory in order to make delivery of that 3,000 pounds. If there is any delay in completing this load, the man is very likely to be out of merchandise and complaining because of this.

Q. Do you, in the operation of your company, consider a statewide destination authority, so far as a carrier serving you is concerned, important to serve your company?

Mr. Kretsinger: I object to that as asking for a conclusion, no foundation, no qualification, no evidence that he has ever used any motor carrier service. The evidence so far is that he has always used his own service.

Mr. Matthews: I object further on the ground that he has shown no knowledge whatever of any existing common carrier service.

Exam. Hanback: The objection is sustained.

Mr. Layne: All right, we will pass that.

By Mr. Layne:

Q. With respect to your merchandise, do you have returns of rejected merchandise?

A. We oftentimes have returns of rejected merchandise.

Q. Under what conditions of sale do you sell your products so that you would have rejected or returned merchandise?

**A.** All merchandise which Steele Canning Company sells is guaranteed to be satisfactory with the buyer. If the merchandise is not satisfactory with the buyer, we take the merchandise back without any questions whatsoever.

[fol. 137] **Exam. Hanback:** Are you still on this same subject, whether it is rejected, returned, for some other reason or—

**By Mr. Layne:**

**Q.** What are the reasons for which merchandise is returned?

**A.** Well, it is possible that there will be damaged merchandise, which may be the fault of either the carrier or us. Occasionally you will have a case of merchandise that will blow up and will damage other merchandise in the load. That can be either our fault or the carrier's fault. Merchandise of that type is rejected.

There are also occasions when merchandise is rejected because it has become damaged in shipment. It could be that it has gotten wet or been handled roughly and things of that nature. It could be that a customer would receive a load of merchandise, cut a can of that merchandise that was coming off the truck and decide that he did not want it. He might reject the entire order for that reason.

**Q.** Do you use in your operation or in the transportation of your commodities any of the existing authorized carriers?

**A.** We do use common carriers in our operation.

**Q.** Under what conditions and what types of shipments do you use the existing carriers?

**A.** We use common carrier on straight truckload shipments and on many shipments that have a destination and two intermediate stops. We prefer where possible to use [fol. 138] common carrier. We ship every case of merchandise that it is possible for us to ship that way.

**Exam. Hanback:** When you say common carrier, do you mean motor common carrier?

**The Witness:** Motor common carrier, yes, sir.

**Exam. Hanback:** You didn't mean rail carrier?

**The Witness:** There has been the time—



**Exam. Hanback:** Related solely to motor common carrier, didn't it, the last two answers?

**The Witness:** Yes, sir.

**Exam. Hanback:** Very well.

**By Mr. Layne:**

**Q.** Do you use at the present time any rail service in the movement of your commodities outbound from the points that you have mentioned?

**A.** We are not at this time using any rail service. It is possible that we have had some cars shipped since the first of this year, but I do not recall them if we have.

**Q.** Have you experienced a limitation in your ability to use motor common carrier service?

**A.** We have definitely experienced a limit to the use of motor common service on this thing, on our shipments. The only way that we have found that it is possible to use common carrier on these small orders ranging from 3,000 pounds to 10,000 pounds is to ship them l.t.l. At the destination points that we have listed here it is impossible to get quick service on l.t.l. shipments.

[fol. 139] **Mr. Kretsinger:** I move that be stricken, Mr. Examiner; still no qualification.

**Mr. Matthews:** He still hasn't named the carrier, sir.

**Mr. Kretsinger:** This is general testimony, and I can't see that it has any value whatsoever.

**Exam. Hanback:** Will you read his answer, please.

(Answer read.)

**Mr. Kretsinger:** That is a broad general statement.

**Exam. Hanback:** The objection is overruled.

**By Mr. Layne:**

**Q.** What common carriers have you used in the transportation of your commodities?

**A.** We have used mostly Jones Truck Line, Inc., in Springdale.

**Q.** Have you on occasion and in times past used some other truck line?



**A.** Yes, in times past we have used Arkansas Motor Freight—excuse me; Arkansas Best.

**Exam. Hanback:** What?

**By Mr. Layne:**

**Q.** Arkansas Best Motor Lines?

**A.** We have used England Bros. in the past. We have had inbound freight of a nature on Campbell's "66", and at times we have had inbound freight on M and A Transportation Company trucks, and also by Frisco occasionally.

**Mr. Ashton:** Frisco Transportation Company?

**The Witness:** Yes, sir.

[fol. 140] **By Mr. Layne:**

**Q.** Does Jones Truck Lines perform service for your company in the transportation of some of these commodities?

**A.** Yes, Jones Truck Lines definitely performs service for us. We ship a good deal of merchandise by them.

**Q.** Are you the officer or manager of the company who supervises and directs what transportation will be used by the Steele Canning Company?

**A.** Yes, I direct the transportation that will be used by the Steele Canning Company.

**Q.** How have you moved the commodities, the canned goods produced in your plant or shipped by you from Lowell and Springdale or purchased and shipped by you from the other points in Arkansas and the one point in Oklahoma?

**A.** Well, on this thing, all I know to do is to start, if some-one objects, they can stop me. All I know to do is tell a story of the thing. If anyone has any objection, I will stop and start all over again and try again.

When I started working for Steele Canning Company back in 1948 Steele had just purchased two trucks. During the war Steele Canning Company did not operate any trucks. All their merchandise was shipped on common carrier by either rail or motor carrier. It was an ideal way to do business because you could back a truck up to your door or have a car set at your dock and load it out and forget about it.

[fol. 141]. Mr. Kretsinger: Mr. Examiner, I believe I will object. If he is trying to get a proper historical picture, I don't think it is proper historical background.

Mr. Layne: Do you mean it isn't proper history or it isn't proper to have a history?

Mr. Kretsinger: It isn't proper historical history. In other words, I don't think he is going about it right.

Exam. Hanback: The objection is overruled.

By Mr. Layne:

Q. Go right ahead.

A. As time progressed we found out that we were selling more and more merchandise in small orders. We continually added to our fleet of trucks as it became necessary as our volume increased, as our customers increased, as these small orders increased, it was necessary for us to add to our fleet of trucks, which we did. We still continued to ship what was possible for us to ship by common carrier. In January of this year we were operating 29 units, tractors and tandem trailers. All during this time we have continued to ship by common carrier. We have never stopped. But we have found that it was necessary for us to operate our own equipment in a private carriage operation in order to hold our business.

Exam. Hanback: We will take a five-minute recess.

(Short recess.)

Exam. Hanback: On the record.

It is now about 3:40 and we haven't finished the direct [fol. 142] examination of this witness, so there is no doubt we can't finish this case today, it will have to be continued. I have no open date on my itinerary to handle the matter. It will have to be continued to a time and place to be fixed by the Commission.

I would like to know, if we have a further hearing in this proceeding, how many witnesses will be presented by the applicant, to begin with.

Mr. Layne: The applicant will present two more witnesses on direct in support of the direct case on the application.

**Exam. Hanback:** As to protestants, how many witnesses will you have?

**Mr. Ashton:** Frisco Transportation Company will have one witness.

**Mr. Bazelon:** I will have two witnesses.

**Mr. Kretsinger:** I will have three.

**Mr. Harding:** I will have one witness.

**Mr. Matthews:** At this time I will have three witnesses and I presume I will at a future date.

**Mr. Ryan:** I have five.

**Exam. Hanback:** Rail?

**Mr. Ryan:** Yes.

**Mr. Durden:** Arkansas Best Freight System, I will have one witness.

**Mr. Eyster:** One witness.

[fol. 143] **Mr. Kretsinger:** Mr. Prestridge has two, I believe, sir.

**Exam. Hanback:** Are they all here now? I don't want to miss any.

**Mr. Kretsinger:** Here is Mr. Prestridge.

**Mr. Jones:** How many witnesses will you have?

**Mr. Prestridge:** One.

**Exam. Hanback:** Next.

**Mr. Jones:** I have four here today and I assume that I would have the same at a continued hearing.

**Mr. Gunn:** I'd have one. I believe Orscheln was here and he'd probably testify and that would be one.

**Exam. Hanback:** What is the name?

**Mr. Gunn:** Orscheln.

**Exam. Hanback:** That would be 24 witnesses.

**Mr. Kretsinger:** Emery Transportation will have one.

**Exam. Hanback:** And the applicant will have two. That will make 27 witnesses to be heard at a further hearing.

**Mr. Kretsinger:** Maybe the strike will be over by that time.

**Exam. Hanback:** I wonder if you could give me some idea as to the time that would be required.

**Mr. Layne:** I can say that the next two witnesses that the applicant presents so far as supporting the application will be shorter than the first two, that is, they will

be shorter on direct. I have no idea what will happen otherwise.

**Exam. Hanback:** Do you think two days would cover [fol. 144] this case for further hearing?

**Mr. Kretsinger:** I'd think so, easy.

**Mr. Ashton:** I should think that most of the protestants' testimony would be in the nature of the authority of the carriers and their ability to perform the service and desire to get the business, and I don't think that would take too long. It will take us about a half hour.

**Exam. Hanback:** Apparently it will take at least two days estimated time.

All right, let's proceed.

**Mr. Gunn:** It is my understanding that this witness will be on for a considerable length of time and I'd like permission to be excused for myself.

**Exam. Hanback:** Yes, you may. If any other attorneys desire to leave at this time, they may do so, and with the understanding—do the parties have any preference where further hearing should be held?

**Mr. Layne:** As far as the applicant is concerned, we would be willing to have further hearing in Washington, D.C., at a time to be fixed by the Commission.

**Mr. Kretsinger:** We would object to that.

**Mr. Bazelon:** I wonder perhaps if Chicago might not be considered as centrally located. I would suggest Chicago.

**Mr. Prestridge:** Most of the witnesses are in the middle west.

[fol. 145] **Exam. Hanback:** How about the other protestants?

**Mr. Kretsinger:** Kansas City would be the best all the way around.

**Mr. Ashton:** The applicant asked for Little Rock originally in this application.

**Mr. Layne:** That is true.

**Mr. Ashton:** I have no objection to Little Rock or Kansas City.

**Mr. Jones:** Little Rock would be pretty much out of line for a lot of protestant witnesses.

**Mr. Kretsinger:** Kansas City is the most accessible.

**Exam. Hanback:** There is one other question I would like to have answered at this time. In the event that the present examiner, Hanback, is unable to attend further hearing if the parties would be willing to have the hearing conducted by another examiner.

**Mr. Kretsinger:** I move that the same examiner continue with the case.

**Mr. Layne:** I think that is preferable. I believe that to be the preferable practice.

**Exam. Hanback:** Off the record.

(Discussion off the record.)

**Exam. Hanback:** On the record.

**Mr. Layne:** I will say right now I would not be willing at this time, Mr. Examiner, to waive the continuation of [fol. 146] the examiner who has heard my and will hear two of my principal witnesses in this case. I am not prepared to say that any other examiner, other than the examiner presently hearing the case, would be acceptable.

**Mr. Kretsinger:** I would join in that statement.

**Exam. Hanback:** Very well, let's proceed with the witness on the stand.

Does any party want to leave, wish to be excused?

(No response.)

**Mr. Layne:** Off the record.

**Exam. Hanback:** Off the record.

(Discussion off the record.)

**Exam. Hanback:** On the record.

**Mr. Layne:** I will request, I believe, Mr. Turnbow to return to any further hearing. I would like to have him finish today, if he could, but if it is a burden on the examiner and the parties to continue today, why, we could continue with Mr. Turnbow at the continued hearing. We wouldn't object to bringing him back.

**Exam. Hanback:** Can we assume, then, that you will be present, Mr. Witness?

**The Witness:** I will be present at a further hearing.

**Mr. Kretsinger:** I would like to finish with him here so in the interim they can't bolster him up with some other testimony.

**Exam. Hanback:** Let's proceed with direct examination.  
[fol. 147] **Mr. Layne:** Carl, I didn't say anything bad about you.

**Mr. Kretsinger:** I don't say that as criticism. I'd do it if I had the opportunity.

**By Mr. Layne:**

**Q. Mr. Turnbow,** turning for the purpose of the next discussion to the items used in the production of canned goods, where does the Steele Canning Company obtain the vegetables and the berries which they can at Lowell, Arkansas?

**A.** Those berries and vegetables, with the exception of blackberries, are purchased within a hundred mile radius of Lowell, Arkansas. I am sorry, I should have specified the items besides blackberries. We purchase Irish potatoes at a further distance than that, and we also purchase sweet potatoes at a greater distance than that, but the bulk of the merchandise which we manufacture is bought within a hundred mile radius of Lowell, Arkansas.

**Q.** Within this hundred mile radius do you buy any vegetables or berries in Oklahoma?

**A.** We buy vegetables and berries in Oklahoma, Missouri, and Arkansas. Excuse me, let me clear this up. I imagine most people here know exactly where Springdale is located with reference to Arkansas and Oklahoma. If they don't, we are about 22 miles from the Oklahoma line and a little farther than that from the Missouri line, but we are in the corner of the state.

**Exam. Hanback:** Now, blackberries and potatoes.

**A. (Continuing)** Blackberries are bought in the Tyler, [fol. 148] Texas, area; Irish potatoes are purchased out of Florida, Alabama, Colorado, Nebraska, South Dakota, and Minnesota.

The sweet potatoes are purchased out of Louisiana, Alabama, Tennessee, North and South Carolina.



By Mr. Layne:

Q. Do you buy any sweet potatoes in New Mexico?

A. We do buy sweet potatoes in New Mexico.

Q. Do you buy any sweet potatoes in Texas?

A. Yes, we do purchase sweet potatoes out of Texas.

Q. Now, with respect to these fresh vegetables and the sweet potatoes and Irish potatoes, how and under what arrangements do you buy these commodities?

A. We buy these commodities on the open market at the time of harvest. Now, when I say on the open market, we have three field men in that area. We deal with 150 farmers, approximately 150 farmers, whom we have dealt with year after year. Now, our field men tell these farmers what they can expect to sell to us out of their current crop. Before they plant they tell them how many acres and the tonnage that they can expect us to buy from them. However, that is not contracted. We do buy what we tell the farmers that we will buy, but we do not contract it, as far as regular contracts are concerned. It is sort of a working arrangement that has been very satisfactory with us over a great number of years.

Q. Is that working arrangement with the field men also applicable to the Irish and sweet potatoes that you buy in [fol. 149] the several states that you mentioned?

A. No. On that oftentimes we send a field man to these different states where the crop is being produced to buy these items. Other times—we don't have anyone who puts out a certain amount of acreage of Irish potatoes or sweet potatoes for us. We buy it at the different locations at the time of harvesting. Sometimes we buy these items through brokers as well as through our own field men.

Q. Do you make purchases, that is, does Steele Canning Company make purchases direct and pay for it direct?

A. Steele Canning Company purchases Irish potatoes and sweet potatoes direct and pays direct to the producers.

Q. Is that also true with respect to the vegetables that you buy within the area surrounding Springdale and Lowell, Arkansas?

A. On the vegetables that we buy in the area surrounding Springdale and Lowell, Arkansas, the farmers who



produce those items truck them to our factory. We buy those items f. o. b. factory on the items that are produced in our immediate area.

Q. Do you buy dry beans?

A. We do buy dry beans. We purchase dry beans out of Michigan, Nebraska, Colorado, Missouri, California. I believe that just about covers the locations.

Q. Are these also purchased by Steele Canning Company?

A. The dry beans are purchased by Steele Canning Company.

Q. You have named, you say that you buy dry beans, [fol. 150] for example, in Michigan, Nebraska, Colorado, Missouri, and California. Can you be any more definite as to the points within those states at which you buy them or at which the transportation at least commences back to Springdale or Lowell, Arkansas?

A. It would be extremely difficult to attempt to name all the points. We pick these beans up at different elevators. Some of them are located in small villages. And usually a large concern will handle the sale of those but we will pick up at any number of different storage points.

Q. What is the situation with respect to the Irish and the sweet potatoes so far as the specification of the points within the states that you have named?

A. It would be impossible to specify the points on potatoes because oftentimes you go to a farmer's shed and the farmer may have fifty, a hundred acres of potatoes, shed out on his farm, you load the potatoes up and the truck takes off.

Q. Do you buy any berries from any point other than at or at any place, any point, other than in Arkansas?

A. Yes; we purchase blackberries from an area around Tyler, Texas. Our boysenberries and strawberries are purchased from Arkansas or Oklahoma, and at times in Missouri.

Q. Does the situation change any, so far as points at which you buy vegetables and berries, if there is an abnormal crop year, or if there is a crop failure in Arkansas?

A. Any time that we have a crop failure or a short crop, [fol. 151] we attempt to buy fresh produce that can be

transported and transport it to our factory and can it ourselves rather than buying the finished product. Now, if we have a short supply on green beans we will buy unprocessed green beans from Florida, Mississippi, North and South Carolina, Tennessee, or Texas. These beans are loaded in the fields or at sheds and transported in a raw state to our factory to be processed.

If we have a short crop on spinach we will transport raw spinach out of the Rio Grande Valley for processing at our factory.

Q. Have you ever transported any peas, that is, not canned, fresh peas?

A. Yes. In the past several years it has been necessary for us to transport peas out of Texas to process at our plant because our local crops have not been of the quality that we desired.

Q. These fresh vegetables which you have referred to that you use in canning, are those transported to your plant at Lowell?

A. Those are transported to our plant at Lowell.

Q. Do you transport any of them to your warehouse at Springdale?

A. Not on fresh vegetables, we do not, because there would be no way to dispose of them and can them at a warehouse.

Q. Do you purchase any other supplies in the production of canned goods?

[fol. 152] A. Yes, in the canning business, first of all, fresh produce that we have discussed is necessary. Besides that we have to have the tin cans to put the produce in and the corrugated boxes to set the tin cans in for shipment. Besides that it is necessary for us to have salt, sugar, caustic soda, labels, that we use in the manufacture of these canned goods.

Q. Can you tell me from what points, what points of origin, you buy caustic soda?

A. We buy caustic soda out of Belasco, Texas.

Q. How do you spell that?

A. B-e-l-a-s-c-o.

Q. From what points do you buy salt?

A. We buy salt out of Grand Saline, Texas, Rittman, Ohio, and Hutchinson, Kansas.

Q. From what points do you buy sugar?

A. We buy most our sugar out of Shreveport, Louisiana, but at times it is necessary to buy it from other points in Louisiana.

Q. In what size shipments does caustic soda, salt, and sugar come to your or is purchased by you, what is the size of the shipments?

A. It depends greatly on the amount of certain commodities which we are packing. Usually our sugar is in a truckload quantity, and our salt is in a truckload quantity. At times we buy a truckload of caustic and at other times we buy a few drums of caustic soda.

[fol. 153] Q. You referred to cans, are they all metal cans?

A. We pack only in metal cans. Now, our source of supply on metal cans, I will attempt to remember all of these places where we pick up. We buy metal cans from Norwood, Ohio, Cincinnati, Ohio, Elwood, Indiana, Chicago, Illinois, Milwaukee, Wisconsin, Mankato, Minnesota.

Q. How do you spell that?

A. M-a-n-k-a-t-o.

Q. Thank you.

A. Houston, Texas, Tampa, Florida, Harvey, Louisiana, and in Springdale, Arkansas.

Q. Is there a can manufacturer's plant in Springdale?

A. We have Heekin Can Company who manufactures tin cans in Springdale.

Q. Is there any other can company or company manufacturing cans within the State of Arkansas itself?

A. American Can Company manufactures cans at Fort Smith, Arkansas.

Q. From what points do you purchase boxes?

A. Our supply of boxes comes out of West Monroe, Louisiana, and Memphis, Tennessee. We also have box manufacturers within the State of Arkansas at Fort Smith.

Q. Are cans also—I mean how are cans shipped, let's put it that way?

A. Cans are shipped in bags, which are huge paper con-

[fol. 154] tainers that hold several cases, depending upon the size of the can. They are shipped in corrugated packing boxes, and they are shipped in bulk.

Q. When they are shipped in bulk, what kind of shipment is that? Is that ordinary—

A. (Interrupting) Rail.

Q. That is ordinarily a rail shipment?

A. That is a rail shipment.

Q. When the cans are shipped in boxes, are these boxes used for the boxing of the material after the vegetables and berries have been put in the cans and actually canned?

A. The cans are dumped on the line; the box goes down another track; after it is canned it goes back into the boxes that the cans were shipped in.

Q. Had you testified that you purchased boxes from West Monroe, Louisiana, and Memphis, Tennessee?

A. Yes, sir, I had.

Q. From what points do you purchase labels?

A. That is almost impossible to answer. We have these little customers scattered all over the United States. The most of these small customers have a label of their own. We buy customers' labels and put them on the merchandise that they in turn buy from us. We also buy labels from the larger customers scattered over the country. In particular we buy out of Peoria, Illinois, out of Bedford, Virginia, Omaha, Nebraska, and we oftentimes pick up [fol. 155] labels in Cincinnati, Ohio.

Q. I failed to ask you with respect to cans and boxes. But the movement of cans and boxes or corrugated boxes, are those movements in truckload or less than truckload amounts?

A. Tin can movements are in truckload quantities.

Q. And how about the boxes?

A. The boxes are in truckload quantities also.

Q. These labels that you purchase, do you have labels made with—do you have Steele labels?

A. Yes, we have our own labels.

Q. Where do you purchase your own labels?

A. We purchase the majority of our own labels out of Peoria, Illinois. We also purchase our own labels out of Omaha, Nebraska.

**Q.** What is the situation under which you would buy labels from a customer? Would you explain that?

**A.** When we receive an order from our broker oftentimes there is a notation on the order "please pick up labels" at this customer's warehouse when you deliver their order. These labels that they want us to pick up are to be used on their next order.

**Q.** Does speed of service have anything to do with picking up those labels, is that a factor in picking up those labels?

**A.** Service is definitely a factor in picking up the labels, if we don't get the labels in in time to make his next shipment that is one pool load which gives delay in delivering. If he has that much delay in delivering he wants to [fol. 156] know just what happened to his shipment, he is out of merchandise.

**Q.** In what quantity are these labels bought by you, that is, Steele labels bought, in what quantities and what amount of transportation—

**A.** (Interrupting) We buy Steele Canning Company's labels in multiples of 30,000, and it depends upon the volume of the particular item that we are buying a label for, but each box of labels will weigh approximately 30 pounds, and on a shipment of labels we will have, of our own labels we may have, anywhere from that 30 pounds on up to four or five thousand pounds. Now, on customer's labels, we buy them in lots of 2,500 each, which would be a little stack about that long (indicating) and about that high (indicating).

**Exam. Hanback:** About a foot square?

**The Witness:** Not quite a foot square. They are more narrow than that, because they have to go on a 303 can.

**By Mr. Layne:**

**Q.** Are there customers' labels in larger amounts than that?

**A.** Yes. Sometimes we have several cartons with ten to twelve thousand labels to the carton that a customer will send to us.

**Q.** So far as the caustic soda, the salt, the sugar, the

cans and the labels are concerned, what point, destination points, are those items brought?

A. We bring those items to Springdale, Arkansas, to Lowell, Arkansas, to Westville, Oklahoma, to Fort Smith, Arkansas.

[fol. 157] Q. Under what occasions or what would be the occasion for bringing these items, under what arrangements would you bring these items to Westville, Oklahoma, for example?

A. We furnish Baron Canning Company with the supplies which they use to manufacture the canned goods that we buy from them.

Q. What is the occasion for delivery of these items to Fort Smith, Arkansas?

A. It is the same situation, exactly. We furnish them the supplies for the items that they pack for us, the sales to us.

Q. Are these items purchased by you?

A. The items are purchased by Steele.

Q. And do you pay for the transportation?

A. We do pay for the transportation.

Q. These cans that you buy, the metal cans, do they come—is there also a lid that goes with the can?

A. Yea, sir, the can is not any good to us without the lid.

Q. What is the can and what is the lid and how is that transported?

A. Well, the can is just like a can of tomatoes looks after you pour the tomatoes out, you have an empty tin can without any lid. The lids are shipped to us in cartons and tubes, along with the cylinders without any lids on them.

Q. Are the lids bought at the same points at which you purchase the cans?

A. The lids are bought from the same sources that we [fol. 158] buy the cans. We have a little trouble occasionally with the lid machine breaking down; we get cans without lids and have to double up on the next load, but they are supposed to come from the same place.

Q. What are the destination points on the lids?

A. The same as cans.



**Q.** Do you supply to any of the other packers that you have mentioned any vegetables?

**A.** No, we do not supply any vegetables to them. I say that we do not supply any vegetables, I am using the words in sort of a restrictive manner. We do supply dry beans to Baron Canning Company, but as far as the fresh vegetables we do not supply them.

**Q.** Has the Steele Canning Company operated vehicles in private carriage in interstate commerce?

**A.** The Steele Canning Company has since 1948.

**Q.** Can you tell me why Steele Canning Company engages in private carriage operation?

**A.** Steele Canning Company engaged in the private carriage operation in order to build and maintain a large volume of canned goods business scattered over some 33 states. We found that it was necessary to build our own fleet of trucks in order to make small deliveries to customers who refuse to buy in truckload quantities.

**Q.** Are you familiar with the operations of your competitors [fol. 150] who are competing in the sale of canned goods?

**A.** I am very familiar with the operation of our competitors who are competing with us in our area. All of our competitors—

**Mr. Matthews (interrupting):** I object to any further statement. I believe he has answered the question.

**By Mr. Layne:**

**Q.** Do you have competing canning—

**Mr. Matthews (interrupting):** I—

**Mr. Layne (interrupting):** I don't know what they want me to do about examining the witness.

**Exam. Hanback:** You finished your answer, didn't you?

**The Witness:** Yes, sir.

**Exam. Hanback:** Proceed.

**Mr. Layne:** Thank you, sir.

**By Mr. Layne:**

**Q.** Are there competing canning companies located in Arkansas?



A. We have competing canning companies located in Arkansas, Oklahoma, Missouri, and Kansas. The competing carriers in that area all operate their own trucks in a private carriage operation.

Mr. Matthews: I object to that, sir. It is the same thing as getting back to hearsay again now. I object to this man testifying about the operations of his competitors and how they transport their goods; I believe it is hearsay.

Exam. Hanback: Can you qualify the witness?

Mr. Layne: Yes, I will be glad to.

[fol. 160] By Mr. Layne:

Q. Do you know how these competitors of yours transport the commodities or the canned goods of theirs from their plants? Just say yes or no, do you know?

A. Yes.

Q. How do you know?

A. Because I see trucks of theirs with canned goods that are painted Alma Canning Company, Allen Canning Company, and various other names.

Q. Do you have any discussions with the officials of these other canning companies?

A. As I testified earlier, we buy and sell merchandise to our competitors quite often and we discuss common problems, which include transportation problems.

Q. Now, how do your competitors deliver the canned goods manufactured by them or how do they transport?

Mr. Matthews: The same objection. It is still hearsay.

Exam. Hanback: The objection is overruled.

A. Our competitors deliver a portion of their canned goods that they produce on equipment that they operate through a private carriage operation.

By Mr. Layne:

Q. When did Steele Canning Company begin its private carriage operation?

A. Steele Canning Company was operating a private carriage operation prior to the war. During the war they

got out of the private carriage business. They got back [fol. 161] in it through necessity in 1948.

Q. What do you mean they got back into it through necessity in 1948?

A. As I testified earlier, we had customers who refused or at least did not buy in truckload quantities. We had no other way to get the merchandise to them and hold their business.

Mr. Kretsinger: Just a minute. I want to object to that. That is a conclusion of the witness. I move that his answer be physically stricken from the record.

Mr. Bazelon: He wasn't even employed by the shipper prior to 1948. That is just when he came in, as I understand it. How does he know what occurred beforehand?

Exam. Hanback: It seems to me the answer related, the last part of his answer related, to what happened after 1948.

Mr. Layne: That is true.

Exam. Hanback: What is your objection based on, Mr. Kretsinger?

Mr. Kretsinger: Let's have the question and answer read. May I have it read?

(Question and answer read.)

Mr. Kretsinger: That is a conclusion and it calls for speculation of the witness.

Mr. Jones: Mr. Examiner, may I also add the further objection that there is no qualification of the witness as to what knowledge he may have had of existing facilities [fol. 162] or what investigation he made to learn of such.

Exam. Hanback: I am going to sustain the objection because there is no evidence that shows that this witness has made any investigation to determine what the availability of for-hire motor carrier service is.

By Mr. Layne:

Q. Let me ask you, Mr. Turnbow, when did you come with the company, Steele Canning Company?

A. June 1948.

Q. At the time you came with Steele Canning Company

in June did the Steele Canning Company operate any vehicles in private carriage?

A. The Steele Canning Company had operated two trucks for a few months.

Q. And when you came to Steele Canning Company did your duties relate to transportation, were they relating to transportation?

A. My duties when I came to Steele Canning Company was in and restricted to the transportation department.

Q. And in the transportation department were you solicited and have you been solicited by motor carriers and by railroads for the transportation?

Mr. Kretsinger: I object to that as incompetent, irrelevant, and immaterial, whether he was solicited or not. That doesn't prove or disprove any issue in the case.

Exam. Hanback: The objection is overruled. I don't see that it has much bearing on what happened in 1948.

[fol. 163] Mr. Layne: What happened in 1948 have much bearing on it? You sustained an objection to a question that asked beginning in 1948 and subsequently they went in private carriage, he said by necessity. Because the witness was not qualified, now I have to go back and establish with what happened in 1948, and I have to start, I suppose, with all the solicitation of all the lines of what he knows about the common carrier service or any carrier service available to him, what he has been told by truck lines and so forth, all the usual, I suppose, qualifications along that line, beginning in '48 and ending in '58, and that is what I am trying to do to show why this company went into private carriage.

Exam. Hanback: I think what is important evidence here would be what happened when he first went with the company in 1948. That is when it is alleged they were having difficulty.

Mr. Layne: That is right.

Exam. Hanback: You may question how he obtained his knowledge.

By Mr. Layne:

Q. You were solicited, were you not?

A. We were solicited.

Q. How did you obtain your knowledge with respect to transportation available to you?

A. Through discussions with representatives of the various truck lines serving our area with the Frisco Railway representatives who service our area and also with [fol. 164] connecting rail carriers who had representatives working in our area.

Q. Were you furnished by motor carriers with point lists and with routing guides of what they would transport and what points they could serve?

A. We continually checked on various stop points with common carriers in our area to work out pool shipments by common carrier, including stops in transit. It was necessary for us to check with their traffic men to find out if these points were intermediate and work out some system to ship everything that we possibly could by common carrier.

Q. Did you check and discuss with these carriers as to whether they held operating authority to serve points where your customers were located?

A. We checked with them on that. We checked with them to see if we got direct service, if it was interlined, if it was interlined how long we could expect for delivery to be made.

Q. Let's take examples and for one let's take Campbell's "66" Express. Did you discuss these matters with representatives of the Campbell's "66" Express?

A. I do not remember whether I discussed it with Campbell's "66" in 1948 or not. Our principal business at that time was being conducted with Frisco Railway Company, Jones Truck Line, and Arkansas Motor Freight, which has since been changed to Arkansas Best.

Q. Have you subsequently at any time been solicited by [fol. 165] representatives and furnished with data by representatives of the Campbell's "66" Express?

A. I have been solicited by representatives of Campbell's "66". I have discussed different shipping points, time involved in making deliveries, and rates.

Q. Over what period of time have the discussions occurred, would you say, in years, at least?

A. Oh, it has been over a long period of years. Possibly since 1948.

Q. Have you discussed these matters with representatives of the Arkansas Best Lines?

A. I have not discussed anything recently with Arkansas Best. We used to ship a fair volume of merchandise by Arkansas Best, but in the last few years we haven't done a great deal of business with them.

Q. Prior to the recent years did you discuss the operating rights and operating operations of Arkansas Best with representatives of that company?

A. Yes, I did.

Q. Did you discuss transportation or have you discussed transportation and transportation authorized to be performed by the Frisco Transportation Company?

A. I have discussed it with Frisco Railway Company, but to my knowledge and memory I have not discussed it with a member of Frisco Transportation Company.

[fol. 166] Q. Have you also discussed transportation and operations authorized to be performed, operating authority held and operations held out by the Jones Truck Line of Springdale, Arkansas?

A. I have.

Q. Have you discussed operating authority and operations to be performed by the England Bros. Freight Line?

A. I have.

Q. Have you discussed these matters with representatives of other carriers, any other motor common carrier?

A. Yes, we oftentimes have representatives from connecting carriers out of St. Louis who call on us and we discuss our different transportation problems with them and the type of service that they are able to give on the other end of the line.

Q. Well, name some of these connecting lines, if you can now.

A. Be-Mac Transportation Company, Western Trucking Company, Husman and Roper.

Q. Have you ever been approached and ever had any

opportunity to discuss anything with the Watson Bros. Transportation Company?

A. To my knowledge I have not discussed any shipments with Watson Bros. Transportation Company.

Mr. Bazelon: The question was, was he approached also?

Mr. Layne: Yes.

By Mr. Layne: \_\_\_\_\_

Q. Have you been approached by any representative of Watson Bros.?

[fol. 167] A. I am trying to recall right now if I received a letter from Watson Bros. here a short time ago after this application went in, and my memory is a little foggy on that point. It is possible that I did receive a letter from them.

Q. But that's after the application was filed in this case?

A. That is after the application was filed.

Mr. Kretsinger: If he doesn't know, I think the record should be stricken, because it is prejudicial and it doesn't sound too good when you read it.

By Mr. Layne:

Q. Do you know?

A. I do not know, as I stated.

Exam. Hanback: The motion is overruled.

By Mr. Layne:

Q. How about the Central Wisconsin Motor Freight?

A. I have never discussed transportation problems with them.

Q. Central Wisconsin Transport Company?

A. No, I have never discussed any transportation problems with them.

Q. Let's take the Chief Freight Lines?

A. No, I have never discussed any transportation problems with them.

Q. How about Churchill Truck Lines?

A. No, sir.



Q. How about Nelson Bros. of Nebraska?

A. No, sir.

Q. East Texas Motor Freight?

[fol. 168] A. No, sir.

Q. Gillette?

A. No, sir.

Q. Western, is that the company you referred to?

A. Wait a minute. Western Truck Lines is a line that operates out of St. Louis that goes through Louisville and Cincinnati. I think the Western—what was the name of this company?

Q. Gillette.

A. I think the company that you are referring to, that is, Western, is a freight line that operates in the west. Am I correct in that assumption?

Q. Yes, I am talking about a freight line that operates to the west from Texas. It is the Western Gillette, isn't that what it is?

Mr. Matthews: I represent Western Truck Lines, Limited, if that is what you are getting at.

Mr. Layne: Is that also a protestant here?

Mr. Matthews: Yes, sir.

By Mr. Layne:

Q. How about Western Truck Lines, Limited?

A. I know nothing about Western Truck Lines, Limited.

Q. Herrin Transportation?

A. I know nothing about Herrin Transportation.

Q. How about Red Arrow Fast Motor Lines, Inc.?

A. I know nothing about them.

Q. Wright Motor Lines?

[fol. 169] A. I received a copy of a letter from Wright Motor Lines after this application was filed. To my knowledge I have not discussed transportation with them.

Q. How about Loving Motor Lines?

A. I have not discussed transportation with them.

Q. Any company with the name of Buckingham?

A. I am not acquainted with Buckingham.

Q. Merchants Fast Freight?

A. No, I am not acquainted with Merchants Fast Freight.



Q. L. A. Tucker Truck Lines of St. Louis, Missouri?

A. I know nothing of their operation.

Q. Southwest Freight Lines?

A. I have made shipments by Southwest Freight Lines in the past. At the time we were doing business with them their nearest terminal was at Tulsa, Oklahoma; they also operated out of Kansas City. I have not done any business with them recently, but I understand that they do have authority in our area.

Q. How about Freightways, Inc.?

A. I know nothing of Freightways, Inc.

Q. Missouri-Arkansas Transportation Company?

A. Mand A Transportation Company at Joplin?

Q. Yes.

A. I am acquainted with them.

Q. You have discussed their service and the authority they have to serve?

[fol. 170] A. I have.

Q. How about Orscheln Bros. Truck Line of Moberly, Missouri?

A. I know nothing of them.

Q. Now, based on your knowledge or based on your experience, did your company go into private carriage operation?

A. Our company went into private carriage operation in order to move small shipments that we do not or could not move—

Mr. Kretsinger (interrupting): Just a minute. He is going back. His testimony is that he went into it prior to the war and he wasn't with them.

Exam. Hanback: As I understand, they were operating two trucks prior to 1948. What you have in mind is that they branched out and increased their private carrier equipment?

The Witness: That is correct.

Exam. Hanback: Since 1948?

The Witness: As I testified earlier, our private carriage operation increased from two trucks in 1948 to 29 trucks in 1958, which, as I said, at least we felt, was compulsory for us to do.

Exam. Hanback: The objection is overruled.

By Mr. Layne:

Q. Now tell me, the transportation which you performed in private carriage on return, that is, from the destination states, on return to Springdale, Arkansas, or Lowell, Arkansas, would they all be single commodity in the truck or would there be more than one commodity in the truck? [fol. 171] A. Very often there would be more than one commodity in the truck. For example, we would have labels in the truck, we would also have tin cans in the truck, or we might have labels and dry beans in the truck.

Q. Do you also have rejected shipments in the truck on occasion?

A. On occasion we do have rejected shipments, and any time we have a rejected shipment in a truck, if the truck is scheduled to pick up cans we merely load cans on top of the rejected shipment.

Q. Would on any occasion any of the items be transported with fresh, with any of the fresh vegetables or any of the potatoes, sweet potatoes, Irish potatoes, anything of that sort?

A. Yes. Oftentimes it has been necessary to cover rejected canned goods and load potatoes on top of it.

Q. Now, I've asked you about your discussions with motor common carriers. Have you also had discussions with rail carriers, representatives of rail carriers?

A. I have had several discussions with representatives of rail transportation. We have been exploring the possibility of piggy-back; we have also been exploring the possibility of some kind of distribution service at large distribution points for direct delivery to the various customers. As yet I have not been able to work out any satisfactory arrangement on that type of service.

Q. With representatives of which railroads have you had [fol. 172] discussions?

A. Representatives of Frisco Railway Company, which is located, has a terminal located in Springdale and services Springdale, Lowell, and Fort Smith.

Q. Is your client at Lowell served by a rail line?

A. It is. It is served by Frisco.

Q. Do you have any knowledge of the facilities of your

customers or any number of your customers, any of your customers?

A. We have several customers, a large number of customers, who are not on rail sidings.

Q. Now turning your attention to the year beginning in 1958, how many vehicles was the Steele Canning Company operating in private carriage in interstate commerce at that time, beginning around January 1, 1958?

A. On January 1, 1958, Steele Canning Company was operating 29 tractor-trailer combinations.

Q. And of that many, of that number, how many were owned by Steele Canning Company?

A. Thirteen units were owned by Steele Canning Company.

Q. The balance, then, were leased?

A. The balance of the units were under long-term lease.

Q. Of the balance how many were leased from E. L. Reddish?

A. We had nine units leased from E. L. Reddish.

Q. From what persons or companies did you have the balance leased?

[fol. 173] A. We had four units leased from T. W. Trout. We had one unit leased from Jim Brooks. We had two units leased from Matthews Steele, Inc.

Q. Did you hear the testimony of Mr. E. L. Reddish here in this hearing this morning? Were you present in the hearing room?

A. I was present during Mr. Reddish's testimony.

Q. Did you hear his testimony with respect to the lease with the Steele Canning Company?

A. Yes, I heard Mr. Reddish's description of the lease.

Q. Was that an accurate description of the lease?

A. Yes.

Q. I would like to inquire of you specifically concerning the drivers of the equipment. Who employed the drivers on the 29 vehicles?

A. Steele Canning Company employed all drivers.

Q. Who paid the drivers?

A. Steele Canning Company.

Q. Were they paid on a trip, daily, weekly, or monthly basis?

A. They were paid on a weekly basis.

Q. Did Steele Canning Company pay Social Security and Workmen's Compensation on these drivers?

A. Steele Canning Company did pay the Social Security and Workmen's Compensation on these drivers.

Q. Did anybody withhold taxes on them?

A. Steele Canning Company withheld their taxes.

[fol. 174] Q. Who employed them? Who interviewed them? Did somebody interview them or what?

A. I interviewed a large percentage of them and we have two men in the traffic department who interviewed drivers at one time or another.

Q. Who gave them their instructions or how were they given instructions so far as the movement of particular shipments or—

A. (Interrupting) They were given their instructions by either our traffic manager or traffic clerk.

Q. With respect to the vehicles leased from these people, including the vehicles leased by Reddish, were they ever subleased?

A. We have never subleased vehicles.

Q. You utilize the equipment exclusively in your operation?

A. We utilized both our own equipment and the leased equipment exclusively in our operation.

Q. Did there come a time in 1958 when the Steele Canning Company had labor difficulties, had any labor difficulties, with respect to drivers?

A. Yes, we had labor difficulties that began in the late winter or early spring. On March 9 we had a wildcat strike. After this wildcat strike occurred we petitioned the National Labor Relations Board for an election to determine if the drivers did or did not want a union. That election was held on March 31. The union won the election. A short time later they were certified as the bargaining agent for the [fol. 175] drivers. Immediately after this certification we began negotiations, trying to work out an agreement, satisfactory agreement. These negotiations, we had meetings with negotiations almost weekly, up until the first of June. On the 1st of June we had a strike and a large number of our drivers refused to go out. After this strike occurred

a representative of the Federal Mediation and Conciliation Service came into our negotiations. We have since that time had two meetings with them. We have not been able to work out a satisfactory agreement. It appears that we are at a deadlock.

Q. Did there occur at any point along here where picket lines were thrown up around your plant, your warehouse?

A. The drivers walked out on June 1. They, I guess, were lazy; they formed a picket line on June 4.

Q. At the time the drivers walked out on June 1 how many pieces of your equipment that you had been operating in private carriage could you continue to operate, were you able to continue to operate?

A. When those drivers went out on June 1, on the second, the night of the first, and the morning of the second, we had 12 pieces of equipment in operation.

Q. At the time of the picketing did the pieces of equipment that were operated by Steele, was there any reduction in that?

A. Yes. It was a slow thing. The trucks would come in, there would be one or less drivers to go out for the next [fol. 176] trip. They joined the striking forces or sought employment elsewhere.

Q. The picket line that was put up on June 4, is it still up?

A. No, it isn't.

Q. When did the picket line cease to operate?

A. The picket line operated through—let's see, June 4 was on Wednesday, Thursday, Friday—that picket line was removed on June 6.

Q. Did the drivers remain on strike?

A. The drivers have remained on strike.

Q. Are you at the present time operating any vehicles in private carriage?

A. We are at this time operating eight vehicles in private carriage.

Q. Of those how many are owned and how many are leased?

A. Five of the vehicles are owned; three of them are leased.

**Q.** What is the situation with respect to the drivers on those vehicles?

**A.** Those drivers are people who have worked for us for some time. They are people who want to work. Since we have conditions as we do these people desire to work. As long as they do have this desire we feel like we are obligated to keep them. However, I don't know from day to day how many units that I will have in operation. This past week, on Thursday night, one of our trucks had headed south around midnight, the truck—

**Mr. Kretsinger (interrupting):** Mr. Examiner, we are [fol. 177] getting prejudice into this record and I am going to object to any further testimony along this line, because apparently applicant is endeavoring to build up his case through this union difficulty that they have had. It is highly improper. It is prejudicial to these protestants, and I move all the testimony in connection therewith be physically stricken from this record. It is incompetent, irrelevant, and immaterial. It doesn't prove any interest or any issues involved in this proceeding whatsoever.

**Exam. Hanback:** What is the purpose of going into this detail about this strike?

**Mr. Kretsinger:** It certainly doesn't prove public interest.

**Mr. Layne:** Is it now all right for me to say something?

**Mr. Kretsinger:** Pardon me, I didn't mean to interrupt you.

**Mr. Layne:** The purpose is to show that there exists a reason for this company to leave the private carriage of its commodities and to seek to have its transportation performed by a contract carrier. The reason that would move this company to leave private carriage, to which it went because it was required to do so, and that it now seeks to substitute a regular carrier, namely, a contract carrier, to perform the service which it previously had performed in private carriage. Now, this is precisely the information which was furnished to the Commission in support of, part of it at least, was furnished to the Commission in support [fol. 178] of the operating authority, which the Commission has already granted.



**Exam. Hanback:** Very well, the objection and motion are overruled.

Now, you may finish your answer. Some truck was traveling south—

**A. (Continuing)** This truck was some 15 miles south of Springdale on the mountain—

**Exam. Hanback:** Can we shorten this a little?

**Mr. Layne:** Yes, I think we can.

**By Mr. Layne:**

**Q.** In your opinion, under the existing situation, will it be possible for the Steele Canning Company to remain transporting its goods in private carriage?

**Mr. Kretsinger:** I object to that. It is purely speculation and calling for a conclusion of the witness.

**Mr. Layne:** I, of course, am asking for his opinion, Mr. Examiner.

**Exam. Hanback:** I will overrule the objections.

**A.** We don't know from day to day whether we will be able to continue in the private carriage operation or not.

**Mr. Kretsinger:** Mr. Examiner, whether he knows from day to day isn't of any consequence in this proceeding, whether he can continue in private carriage. As far as that goes, he hasn't known from day to day since they first started to increase this operation in 1948 what they could do.

**Exam. Hanback:** There is no evidence so far to show [fol. 179] whether they would not continue the private carriage, even though the applicant got the authority that they are seeking.

**Mr. Kretsinger:** That is right.

**By Mr. Layne:**

**Q.** Let me ask you, do you intend to go out of the private carriage business in the event this application is granted?

**Mr. Kretsinger:** I submit in that connection, I submit this witness isn't qualified to answer that question, because he is merely in the traffic department and he isn't a policy witness.



**Mr. Layne:** Mr. Kretsinger, please, I identified this man at the beginning as the general manager of this company, the vice-president and general manager of the Steele Canning Company.

**Exam. Hanback:** The objection is overruled.

**Mr. Matthews:** I have another objection, sir. I don't want to quarrel with a previous statement. As I understood this gentleman's testimony just a short time back, he said he had five or six drivers which were old employees of the company and which he was going to provide a job as long as they wanted it. I think that would show that he intends to stay in private carriage.

**Exam. Hanback:** The objection is overruled.

Is there a question pending?

**By Mr. Layne:**

**Q.** Do you intend to go out of the private carriage business in the event of this private carriage of commodities [fol. 180] of Steele Canning Company in the event this application is granted?

**A.** We intend to go out of the private carriage business as quickly as circumstances will permit us to do so.

**Q.** With respect to your existing equipment that you own, what would you do with that equipment?

**A.** Well, it depends on conditions at the time. If and when we go out of the private trucking business, which we intend to do, we will sell that equipment to the best advantage at that time.

**Q.** Have you already sold some of the equipment which has been shut down as a result of the strike?

**A.** We have sold six pieces of equipment.

**Q.** Did you sell any of that to E. L. Beddish?

**A.** No, we did not.

**Q.** When you say six pieces of equipment, do you mean six tractors and six trailers?

**A.** I mean six tractors and trailer combinations.

**Q.** Have you had meetings with your existing drivers and in which you discussed whether they could or would continue to drive for you?

**A.** Yes; last Saturday I had a meeting with our drivers, and I didn't lose any drivers last Saturday. But, as I said

before, I don't know how long we are going to be able to keep them working.

Q. With the strike, how many pieces of equipment are now being utilized, counting the ones that you are continuing [fol. 181] ing to operate at the present time or are able to operate and Reddish in the transportation of your commodities?

A. Mr. Reddish is operating nine pieces; we are operating eight pieces: a total of seventeen pieces of equipment.

Q. Has this availability of seventeen pieces of equipment hampered the operation of Steele Canning Company?

A. It has very definitely hampered our operation. We are having difficulty getting our pool shipments out.

Mr. Matthews: Just a minute, now. Does that mean, if I may inquire here to clear this up, does that mean that the witness is having trouble getting shipments out by private carriage? Is that what the question was intending?

Mr. Layne: Oh, no.

Mr. Matthews: By any means?

By Mr. Layne:

Q. Let me ask you, are you having difficulty now getting your pack moved?

A. We are having difficulty getting our pack moved. We are having no difficulty moving shipments on this nine pieces of equipment of Mr. Reddish's and the eight pieces of equipment which Steele Canning Company is operating. We are getting all the merchandise out we can on those seventeen units. We are having no trouble there. What I am saying is that those seventeen units are not sufficient to keep up with our volume of business.

Q. Have you discussed with Mr. Reddish the prospect [fol. 182] of his buying additional equipment in the event or supplying additional equipment to you?

A. We have discussed with Mr. Reddish his buying additional equipment. However, under this emergency permit that he was operating on, 30-day authority, and then an extension for 15 additional days, we didn't feel like we could even expect him to buy equipment on such authority.

Q. Are you prepared, is your company prepared, to

enter into a contract with Mr. Reddish for the performance of contract carrier service by him to your company?

A. We are prepared to enter into such an agreement.

Q. Do you expect Mr. Reddish to devote units to your operation exclusively?

A. Yes we do.

Q. Is Mr. Reddish now devoting his equipment to you for the transportation of your materials exclusively?

A. Until the testimony this morning I thought that he was, because there was no lost time in the trucks returning to Springdale. From his testimony this morning I understand that he had hauled some exempt commodities.

Q. With respect to exempt commodities, are you in your operation considering the inbound movement of materials and supplies that you have enumerated, is it possible for you to load every vehicle back?

A. No, it isn't. We can load a good percentage of them [fol. 183] back, but we can't load every one of them back.

Q. What was your experience when you were in private carriage, were you able to load them all back?

A. No; we were not able to load them all back. In our own private carriage operation we loaded every truck that we had that we could have a back-haul on. We understand that it is impossible for a carrier to exist on a one-way haul.

Q. Can you tell us whether the production and movement of canned goods by Steele Canning Company from the several locations outbound from Arkansas and the one point in Oklahoma is on a seasonal or a regular basis?

A. It is seasonal to a certain extent. Now, in order to clarify that you may want me to explain the operation. If you want me to take that time, I will.

Q. I would like to have you explain the extent to which it is seasonal and the extent to which there is any regular flow of traffic.

A. All right, we are in bean pack now. The bean pack will probably extend through this week. Our bean pack is normally over around the Fourth of July, though. From beans we go into tomatoes, around the last week in July to the first week in August. We pack tomatoes, then, in August and September. Around the first of September we are into what we call our fall bean pack. At the end of

September we pack mustard greens, kale, greens through September and October, and then beginning about the 15th [fol. 184] of November through the 15th of January we pack what is known as the fall spinach pack. Our spring spinach pack on Spinach that was planted later begins about March 15 and extends through April 15 to May 1st. Our spring green pack starts at that time and lasts up until June 1st when we are in green bean pack again. So it is that cycle. So we have peak times and it is more or less an even flow, too.

Q. With respect to transportation outbound and supply to your customers, do you supply your customers the year-round, 12 months a year?

A. We supply our customers 12 months a year. At times, especially when we are in bean pack, we sell beans in larger volume than we do any other item, and we have a peak season as a rule during bean pack and also immediately following the first of the year.

Q. What is the situation so far as your purchases from the other canning companies, Cain Canning Company in Springdale, Arkansas, and the Baron Canning Company in Westville, Oklahoma, the Keystone Packing Company at Fort Smith, Arkansas, and the Springdale Canning Company in Springdale, Arkansas?

A. Our purchases from them are more or less consistent.

Q. What is the situation with respect to your purchases of the various canned goods that you identified, such as canned shoe string potatoes, canned kraut, canned corn, and such items, how is that?

[fol. 185] A. We usually buy the canned corn and the canned kraut during the packing seasons. We buy enough to carry us the entire year because it goes out in small quantities. On the spaghetti and the shoe string potatoes we buy as we need it because they are not seasonal items.

Q. Let me ask you, Mr. Turnbow, do you appear here in support of the application of E. L. Reddish?

A. I do.

Q. Do you support the grant of the authority which E. L. Reddish has applied for before the Commission?

A. I do.

Q. Does your company require that service?

A. We feel like the service is definitely necessary to the continuation of our operation, on the scale that we are now operating.

Mr. Layne: I believe that is all I have.

Exam. Hanback: The witness is available for cross-examination.

We will take a five-minute recess.

(Short recess.)

Exam. Hanback: On the record.

It is understood that the witness will be present at further hearing in this proceeding.

Is that correct?

The Witness: That is correct, sir.

[fol. 186] Exam. Hanback: You are temporarily excused.

(Witness temporarily excused.)

Mr. Layne: If we are going to close the hearing now, Mr. Examiner, I would like to reserve the possibility that I have not made some point clear in my notes or I have not cleared up some point—I do not know what it is now; I have nothing in mind now, but I may want to clear up a point or two on further direct examination when we have further hearing.

Exam. Hanback: The hearing in this proceeding is continued to a time and place to be hereinafter fixed by the Commission.

(Whereupon, at 5:10 p.m., an adjournment was taken until a time and place is set by the Commission.)

[fol. 187]

**BEFORE THE INTERSTATE COMMERCE COMMISSION**

**Docket No. MC-117391**

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**In the Matter of:**

**E. L. REDDISH**  
**Springdale, Arkansas**

**Contract Carrier—Irrregular Routes**

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**Transcript of Hearing of October 20, 1958**

**Cambridge Room**  
**New Pickwick Hotel**  
**Kansas City, Missouri**

**Met, pursuant to adjournment, at 9:30 a.m.**

**BEFORE:**

**H. L. Hanback, Examiner.**

**APPEARANCES:**

**(As heretofore noted.)**

**Additional Appearance**

**Chester G. Hayes, Jr., 139 West Van Buren Street, Chicago 5, Illinois, appearing for Class I Rail Carriers in Western Trunk Line Territory-Pacific Southwest Railroad Association, Protestants.**

[fol. 189]

**PROCEEDINGS**

**Exam. Hanback: Come to order, please.**

**The hearing in No. MC-117391, which was continued and assigned for this date and at this place is resumed.**

**Are there any additional appearances?**

**Mr. Layne: I would like to put in an appearance for Mr.**



Chester Haynes, Jr., 139 West VanBuren Street, Chicago 5, Illinois, on behalf of the Class Route I Rail Carriers in Western Truck Line territory and Pacific Southwest Railroad.

Mr. Ryan: My name is E. L. Ryan, and I was here before. He is just with me today here in the hearing room. He is an attorney licensed to practice before the Interstate Commerce Commission.

Exam. Hanback: Is applicant ready to proceed?

Mr. Layne: Yes, Mr. Examiner. I would like to have the record quite clear, at the time that the hearing adjourned, previous hearing adjourned, one of the shipper witnesses, Mr. Walter Turnbow was on the witness stand, and I had at that point concluded my direct examination with the observation, however, that there might be some questions that a review of the record would reflect that I should ask when the hearing resumed. I would like him to return to the stand and ask him additional questions.

Exam. Hanback: All right. Mr. Turnbow, take the stand, please.

[fol. 190] Mr. Layne: I should also at this time point out to the Examiner that at the prior hearing, which was held July 23, 1958, in Kansas City, the applicant did not have available for distribution nor for marking as an exhibit a copy of the temporary operating authority which was granted by the Commission in this Docket MC-117391, Sub 1TA. I now have available those copies of the temporary operating authority, which I would to at this point introduce and have marked. I believe the next number would be Exhibit 7.

Exam. Hanback: It will marked Exhibit 7.

(Applicant's Exhibit No. 7, Witness Turnbow, was marked for identification.)

Mr. Layne: I would also like to submit to the Examiner a copy of the order of the Interstate Commerce Commission dated 26th day of September, 1958, of the order granting temporary operating authority.

Exam. Hanback: It will be marked Exhibit 8.

(Applicant's Exhibit No. 8, Witness Turnbow, was marked for identification.)



## OFFERS IN EVIDENCE

Mr. Layne: I would like to move the admission of the Exhibit No. 7 and 8.

Exam. Hanback: Any objection?

(No response.)

Exam. Hanback: Exhibits Nos. 7 and 8 will be received in evidence.

[fol. 191] (Applicant's Exhibits Nos. 7 and 8, Witness Turnbow, were received in evidence.)

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WALTER TURNBOW resumed his testimony as follows:

Direct examination (continued):

By Mr. Layne:

Q. Mr. Turnbow, the last session on this before this Commission with respect to this application, you indicated that there had been a strike of drivers formerly employed by Steele Canning Company and that the strike continued as of the time of that hearing, July 24, 1958. I would like to ask you about that strike now.

A. That strike is still continued.

Q. Can you tell me whether between the last hearing, July 23, 1958, and the present time, Steele Canning Company had used the services of the E. L. Reddish in the transportation of canned goods and supplies as authorized under the Emergency Operating Authority and the Temporary Authority granted to the commission of E. L. Reddish?

A. Steele Canning Company has been using the services since July 19 through September 30. We have shipped 160 loads by him for a total of 5,132,251 pounds.

Exam. Hanback: I wonder if you would state the origin point.

The Witness: The origin points have been Springdale, Arkansas, Westville, Oklahoma, Fort Smith, Arkansas, Lowell, Arkansas.

By Mr. Layne:

Q. And, generally, the destination point in that are—I [fol. 192] call your attention to the list of cities that are attached to Exhibit No. 7, the temporary operating authority granted by the Commission.

A. We have shipped loads in general to all territories listed on this operating authority.

Q. You are referring to Exhibit No. 7?

A. Exhibit No. 7, yes.

Q. Mr. Turnbow, at the previous hearing I asked you some questions with respect to the commodities received inbound to Springdale, Arkansas; Lowell, Arkansas; Fort Smith, Arkansas; and Westville, Oklahoma. Can you now tell me the volume? Give the record some indication of the volume of inbound commodities received by Steele Canning Company at these various points and the specific items which are received inbound to the point.

A. Well, the volume received varies with the packing season. In a normal week we will receive as high as 30 truckloads of claims; we will receive four or five truckloads of boxes in a week's time; we will receive as high as two loads of sugar; caustic soda, we will receive approximately a load a month during the potato packing season; we receive labels in small quantities constantly. It would be very difficult to estimate the number of labels we would receive in any particular period.

Q. Now, at what point are the various commodities received inbound?

A. We receive this inbound movement at Lowell, Arkansas; [fol. 193] Springdale, Arkansas; Westville, Oklahoma; Fort Smith, Arkansas.

Q. Is there a difference in the volume received by Steele Canning Company at these various destination points on inbound movements? Is there a difference on the volume?

A. Oh, there is a difference in volume.

Q. What is the difference in the volume of goods received inbound?

A. Well, Steele Canning Company furnished the packing supplies necessary for the production of the different items that these other companies pack for Steele Canning Company.

**Exam. Hanback:** I would like to clarify a question. Do you receive any canned goods?

**The Witness:** Yes, sir, we do.

**Exam. Hanback:** You testified at the previous hearing of the canned goods. Well, what about fresh fruits and vegetables?

**The Witness:** We do receive them.

**By Mr. Layne:**

**Q.** Can you give us some indication of the volume of the canned goods that you receive inbound from other carriers?

**A.** I indicated at the last hearing on what we had received since the 1st of the year up until that point.

**Q.** Has that movement continued?

**A.** Yes, that has continued, and I think that is a fair representation of what we ordinarily receive.

**Q.** Now, do you support the application hearing for authority to perform this service in movement of the materials [fol. 194] and supplies inbound?

**A.** Yes, I do.

**Q.** Why do you support the application for inbound service?

**A.** Well, first of all, as a matter of convenience. We correlate our inbound movement with our outbound movement because of limited warehouse space. It is very necessary to have a close relation between our outward and inward bound movement. And the second reason is that I realize from our experience in private carriage that it is not possible for a carrier to exist on a one-way movement. We expect Mr. Reddish to dedicate his equipment by service. If we do not have a return movement for him, he will be forced for the movement himself where that will take the trucks a certain amount of time out of the service that we should have out of the trucks.

**Q.** Now, since the last hearing, have you had any discussions with any existing carriers with respect to service for your company?

**A.** Yes, I have.

**Q.** With what companies or carriers have you had discussions with respect to service to your company?

A. I had discussions with Jones Truck Line, Arkansas Best, M. & A. Transportation Company, Campbell 66, and Loving Transportation Company.

Q. What was the nature of your discussion with Jones Truck Line?

A. Well, Jones Truck Lines, we often had discussions of [fol. 195] our transportation problems with them, actually ran into trouble moving our merchandise, we have discussed at length different points that we need service to. I have attempted to work out some method to transport these small orders to these various cities. I have found from my discussions with them that the only way that it's possible for them to handle a large majority of our movement is on LTL basis.

Q. Is that a satisfactory service?

A. No, it's not.

Mr. Matthews: I will object to that inasmuch as I don't believe that this record shows that the applicant is proposing any different type of service from that actually in existence by existing regular route carriers.

Exam. Hanback: Objection overruled.

By Mr. Layne:

Q. Will you go ahead and answer the question.

A. LTL shipments are not satisfactory for two reasons. The primary reason is the delay in getting delivery to—

Mr. Matthews (interrupting): Mr. Examiner, another objection inasmuch as the record permanently shows that the applicant has been transporting the shipments of this particular shipper as less-than-truckload shipments and that he continued to permanent authority. If this is granted now inasmuch as this is proposed, and I don't think this witness shall be allowed to say that that type of service is satisfactory. If he is here for the applicant and that is what he is going to do, that doesn't make sense.

[fol. 196] Exam. Hanback: Objection overruled.

The Witness: We have not been shipping less than truckloads on the majority of our movements. We have proved several points, but we have given truckload volume for

those points. Less-than-truckload service is not satisfactory because of the time element involved in delivery; it is also not satisfactory because it throws us out of a picture in our territory; our competitors down there have their own trucks; they render the service that we are attempting to support for E. L. Reddish. And on that, your freight rates on LTL shipments are prohibitive to most points.

By Mr. Layne:

Q. All right, now, what was the nature of your discussions with Campbell 66 Express?

A. My discussions were essentially the same as they were with Jones Truck Lines as to the points that they could serve, the time involved in getting shipments to the various points.

Q. What was the nature of your discussion with Arkansas Best?

A. Generally the same.

Q. What was the nature of your discussion with M & A Transportation Company?

A. The same.

Q. Did you have any discussions with Loving that was any different than with the discussion with the others?

A. Yes, I did. I had read the protest that we had received copies of, and I was trying to explore the position on [fol. 197] these different lines. I called Loving Transportation Company on October 3, and talked to them about shipments which we had. One of them was to Davenport, Iowa, about some stocks. The other was to Galesburg, Illinois, about some stocks. I found in talking to Carroll Loving that she could take these shipments, but that it would be necessary for her to move these, to pick up at our plant and move these shipments to Denver, Colorado, and reship from Denver, Colorado, to Davenport, Iowa, and Galesburg, Illinois. Well, of course, it's something over five hundred miles to Davenport, Iowa; it's 800 miles to Denver, Colorado; therefore, it was not a practical solution for the fact that the time element involved was too long, it was a burden in a way to handle the shipment and the freight rate was higher than they were out of Springdale by the carriers that we have there.

**Q.** That would not be a satisfactory service for you?

**A.** No, it would not be.

**Mr. Layne:** I believe that's all I have, Mr. Examiner.

**Exam. Hanback:** You may cross-examine. I wish the motor carrier attorneys would get together and see if one counsel couldn't handle as much of the facts to be brought out, and same with the rail carriers' attorneys.

**Mr. Jones:** One motor carrier attorney to do all of the examination in behalf of the carrier, because we represent clients in different territories?

[fol. 188] **Exam. Hanback:** Well, it wouldn't be for all. We would save considerable time on general questions.

**Mr. Jones:** Yes, undoubtedly, but not on repetition.

Cross examination.

By Mr. Jones:

**Q.** Mr. Turnbow, when you talked to Carroll Loving on October 3, was anything said about handling this transportation via Kansas City?

**A.** There was at the time, Miss Loving told me that she had authority to Oklahoma City in a 20-mile radius of the city; that she was very much interested in any movement that we had to the Colorado points or that she could inter-line, have control points. Other than that, she thought we could work out some more satisfactory means, she suggested that I call Jones Truck Line.

**Q.** The protest which you mentioned which you had seen on which you were basing your explanation of possible service was the petition for reconsideration on the temporary authority application of Reddish filed on behalf of Loving, Buckingham, and Reddish lines, is that right?

**A.** That is correct.

**Q.** Did not that petition state that service into Illinois could be made by combination of Loving and Buckingham over Kansas City?

**A.** Do you have a copy of the protest there?

**Q.** Yes, sir.

[fol. 199] **A.** Should I read it?

**Q.** No, just read it to yourself to refresh your memory.



A. O.K. The point that I was referring to here is the point that is listed as Illinois, which says "The combination of Loving, Buckingham Express, and Buckingham Transfer above set forth would permit service to all points in Illinois from all four origins." Directly under that is listed Iowa, the same statement is true as to Iowa. That was the basis that I was talking to Miss Loving on, and she said that she interchanged at Colorado points only.

Q. The protest states that this service to Iowa, and Illinois, could be made to an interchange to Kansas City?

A. I did not see an interchange to Kansas City. Would you read that, please?

Q. If you would read the part there, just read it to yourself to refresh your memory.

A. This protest states that Loving Truck Lines can transport said commodities from points in Arkansas, to points in Oklahoma, and also between points in Oklahoma, and can transport between points of a 20-mile radius of Oklahoma City on the one hand and to points in Kansas, and also can transport between points and places similar on the one hand and Texas, Oklahoma, and on the other hand on and south of U. S. 50, which includes Kansas City. On that Miss Loving told me that she would have to interline at Denver, Colorado.

[fol. 200] Q. Did you ask her?

A. No, I did not ask her if she could interline, was a place that she would have to interline, and I called her to get the shipments to her.

Q. You asked her if you could furnish her with a truck on Monday morning?

A. No, sir, I asked her if she could on Monday noon. She stated that she could and she said she would have to call me back and then she told me about the way this went through Colorado, and back to these destination points that I have given. I did tell her that I understood from reading this protest of her attorneys that she could handle this. She said she could handle it.

Q. And she likewise gave you information about a more direct routing and at a cheaper rate?

A. She did not give me a rate of another carrier, just her rate and she suggested that I could get a better rate from Jones Truck Line.



**Q.** And did she solicit business into Colorado?

**A.** She did say she would be happy if we could—

**Q.** And what did you tell her about Colorado?

**A.** I told her we did not have a large movement into Colorado, if something worked out—

**Q.** Did you not tell her that Colorado was out of your marketing area?

**[fol. 201] A.** I told her we did not have a large movement into Colorado.

**Q.** Did she tell you that she could give you service into Colorado?

**A.** Yes.

**Q.** You have never used that service?

**A.** No.

**Q.** Now, have you had any discussion with Wright Motor Line?

**A.** No, I haven't.

**Q.** You have received a letter, I believe you stated at the previous hearing, from Wright Motor Lines?

**A.** I did.

**Q.** You received a telegram also, did you?

**A.** That's correct.

**Q.** And did not the letter call your attention to the fact that Mr. Rogers at Wright Motor Line had called upon you in the year 1932, '34, and '35, soliciting your business?

**A.** The letter stated that he had called the office at that time, yes, sir.

**Q.** Can you state whether or not it is a fact that he did call at the office?

**A.** No, sir, I cannot state for a fact.

**Q.** You don't know whether he did or not?

**A.** I do not recall.

**Q.** He stated in his letter, did he not, that on those calls that he had been refused any traffic for the reason of the **[fol. 202]** fact that Steele Canning Company was operating its own trucks?

**A.** He made that statement but I cannot verify it.

**Q.** Well, it is a fact if he had called upon you, you would not have given any business during that period, would you?

**A.** It's altogether possible that I could have given him the

business if I had business available. At the time we used common carrier quite often.

Q. Would you know of any reason why you would not give him service?

A. Yes, sir, we have several Class A common carriers in our area, we have Arkansas Best.

Q. What do you mean?

A. Well, Class A. I don't know of technical terms, but I would refer to them as first-rate common carriers, they have always rendered good service. We have Arkansas Best, we have Campbell 66, we have Jones Truck Line.

Q. Are you talking about Colorado now?

A. I am talking about—they can interline on straight truckload shipments or shipments with the stocks that they can handle. Who is 800 miles way up there, why should I make a long distance telephone call, I can pick up the telephone and call to Springdale and have a truck there.

Q. Have you used them into Colorado?

A. No, sir.

Q. Do you know what kind of service they had available in [fol. 203] Colorado?

A. No, sir, I have not. I understand with discussion with them, I have shipped to Denver.

Q. But as far as you know was the service available been satisfactory?

A. No, sir, it would not be. Often times I have to stop a truck and deliver it to Kansas and other Kansas points. I have to have stocks as a rule, and loads been going to Colorado to have the services of common carrier.

Q. Are you familiar with Exhibit 6, which was introduced on July 23.

A. Pass the Exhibit No. 6. I have seen this exhibit, yes.

Q. And is that fairly representative of the shipments from your company to various origin points?

A. I would say it's fairly representative.

Q. This covers from June 14 through July 16, does it not?

A. I will have to check the dates, it's dated here. It runs from June 14 to July 16.

Q. Now, during that time you had one truckload of

canned goods from any of your origins, in this case Springdale, which went to any Colorado points, is that not right?

A. I will have to check.

Q. Will you do so, please.

A. Yes, sir.

Q. And that consisted of four drops at Denver, Colorado, [fol. 204] is that correct?

A. That's correct.

Q. Have you had any shipments to Colorado points since July 16?

A. I cannot give you a definite answer to that, I have been out of the office a great deal and I cannot testify as to the exact points we have shipped. I have just got out of the hospital.

Q. I tell you that Wright Motor Lines are located at Rocky Ford, Colorado, and she accepts long distance telephone calls for services, and that they have trucks in Arkansas on a weekly and daily basis and available for service, is there any reason why you could not use Wright Motor Line service on these shipments to Colorado?

A. Yes, often times, yes.

Q. What is it?

A. It depends altogether on speed. Many times on making delivery of these foods, our customers are running a particular sale, we have orders for a rush shipment; I do not have time to get a truck in there; and from observation into Springdale, I have seen Wright trucks occasionally, I have seen them unload beet sugar at Welch Grape Juice Company; and I know and I think you know that they have the sugar movement in there and that's the reason the trucks are in Springdale, and we cannot correlate our movements outbound to receive sugar.

Q. Is it your statement that that's the only occasion that [fol. 205] Wright has to have trucks in Arkansas?

A. No, I did not say that, that is what I observed.

Q. How much advance notice can you ordinarily give the carrier?

A. Sometimes two days, sometimes we can give an hour.

Q. On the occasion you called Miss Loving you were able to get three days?

A. That was over the weekend.

Q. You called her Friday for a truck to be there Monday noon?

A. That's correct.

Q. Now, you don't know what kind of service Wright can give you, do you?

A. No, I do not.

Q. Because you have never tried to use the service?

A. By the same token though I don't feel that Wright can give us better service than our local carriers.

Q. Do you feel they can give you good service?

A. It is doubtful because I don't believe he is equipped in the area to handle our volume.

Q. Now, that is not based on any information that you have but—

A. (Interrupting) It is based only what I observed in Springdale.

Q. Of Wright's trucks?

A. Of Wright's trucks.

Q. You have never talked to Wright to see how often they [fol. 206] could give you service?

A. I have not talked to Wright to my knowledge.

Q. Now, did you know what service that Loving could give you into Colorado?

A. Miss Loving outlined me the service.

Q. And was there anything wrong with that service?

A. No, there was nothing wrong providing they had the equipment ready at the time we make the shipment.

Q. Loving has much more equipment than the applicant here, does she not?

A. But that equipment is not dedicated to our service, we cannot depend on that equipment to be available to us.

Q. On the one time you called she agreed she would have the equipment there?

A. Yes, but she also agreed it was not satisfactory to handle the shipment.

Q. If that shipment had been to Colorado—

A. (Interrupting) You stated in your protest—

Q. (Interrupting) Please, just a minute. And I believe she told you that she could handle it to—

A. Yes.

Q. Had that shipment been to Colorado the trucks likewise would have been there when you wanted them, wouldn't it?

A. I cannot say definitely that they would.

Q. Now, the one time that you called her, you asked for [fol. 207] a truck Monday noon?

A. She stated that she would.

Q. So far as the equipment is concerned and as far as you know she would have the equipment available?

A. I don't know what to believe or what not to believe.

Q. Miss Loving repeatedly asked you for business?

A. Miss Loving stated that she would like to have business that we have to Colorado.

Q. All right. Now, you stated that you might have to combine a shipment to Liberal, Kansas, to some points in Kansas, was that your statement?

A. No, sir, I stated that it would be necessary for us to complete truckloads to combine Colorado shipments with points in Kansas, en route to the destination. I mentioned Liberal, I could also handle.

Q. Have you done that?

A. Yes, sir.

Q. When can you do that?

A. We do that quite often.

Q. Then you do that?

A. You are asking me to draw records out of there, I can't do that.

Q. You are the witness, Mr. Turnbow, I am here asking you for information.

A. I could safely say that we have in the past 60 days.

[fol. 208] Q. Well, a few minutes ago I asked you if you had made any shipments to Colorado as of July 16, and you said you didn't know.

A. I said I thought I could say we had combined Oklahoma points.

Q. Well, how about Colorado?

A. Kansas points with Colorado points?

Q. Yes, in the last 60 days.

A. I think that we probably have, that would be the usual routine.

Q. But a few minutes ago you told me that you didn't know if you had shipments.

A. I said I cannot recall.

Q. All right, so when you say that you have in the

last 60 days combined Colorado shipments and Kansas shipments—

A. (Interrupting) I did not say that we had, I said we probably had, it is a common occurrence.

Q. Can you tell me any specific instance in the past year when you have combined any Colorado shipments with a shipment of Kansas?

A. I cannot give you the specific date on it, but I recall a shipment going to Denver that was combined with Liberal, Kansas.

Q. That's the one that you can recollect?

A. I definitely remember that shipment.

Q. Now, do you understand that Loving Truck Lines [fol. 209] can give you that service?

A. No, from Miss Loving's conversation with me, she told me she could serve Colorado points and interline with Colorado points only, with the exception of the 20-mile radius of Oklahoma City.

Q. Well, did you ask here between Kansas and Colorado?

A. No, she stated to me that she could handle the Colorado points.

Q. The protest which you have referred to states that Miss Loving can serve southeastern Kansas, did you not?

A. Miss Loving said Colorado points only.

Q. Well, that's all you talked about?

A. Well, now, I don't quite understand this.

Q. You didn't have any shipment to Colorado or Kansas, either one, did you?

A. Well, I don't understand this, but I am accustomed for common carriers to give me the best routing to certain points. If she could serve these Illinois, and Iowa, points with an interline at Kansas City, I think surely that she would have told me that she could.

Q. Well, let's get back to the subject that we were discussing. You didn't discuss that with her, did you?

A. I did not discuss Kansas with her.

Q. Do you have any objection, do you think our services are not modern?

[fol. 210] A. No, I have no objection.

Q. Do you have any knowledge or reason why that service would not meet your needs?



A. I feel that Miss Loving cannot give us service that other common carriers that other common carriers cannot give us. Let me rephrase that different. I do not believe that Loving Transportation Company can give us service that other common carriers cannot give us through interline.

Q. Well, I wasn't talking about interline, I was talking about a direct single-line service. Do you know of any reason why that would not meet your needs?

A. No, I do not.

Q. Now, since the issuance of the authority shown on Exhibit No. 7, have you been receiving inbound shipments to your four points?

A. We have received inbound shipments as long as Mr. Reddish was operating under emergency authority, which gave him authority to handle inbound movements on certain items.

Q. The question was "since the issuance of the authority shown on Sub No. 7"—

A. (Interrupting) There was an emergency authority running currently with temporary authority.

Q. Well, do you mean you are still operating under the emergency authority?

A. No, sir, he was operating under emergency authority [fol. 211] after this temporary authority had been issued.

Q. And for how long?

A. I don't recall the exact dates on that now, I probably have it here in some of my papers.

Q. Well, approximately?

A. If I recall correctly, there was 105 day total, but I can't state that as a definite fact.

Q. Well, they operated under the emergency authority since the 1st of September?

A. The emergency authority ended on the 26th of September, I believe that's correct.

Q. Was that when the permanent—I mean the temporary authority became effective?

A. Well, now, you are asking me questions on these authorities that I am not qualified to answer because I know nothing of the technicalities relating to them.

Q. That is the date—

A. (Interrupting) But I do know there was an emergency



authority running concurrently with the temporary. I cannot give you the dates on that.

Q. Put the question this way, since the expiration of the emergency authority, you have not made any inbound shipments?

A. We have had inbound shipments on dry beans.

Q. Now, have you been receiving these other commodities since that time?

[fol. 212] A. We have received a certain percentage of these commodities.

Q. That is, cans, boxes, sugar, and things like that?

A. Yes.

Q. And you have been shipping them by other carriers?

A. No, we haven't, we were fortunate enough that we have been able to get in some sizes on cans that were not manufactured in Springdale before that authority expired. Our packing season, we have between seasons, we have not had the need for the huge movement in the past two weeks that we normally have. We did have our facilities full of cans when this authority expired. We have been able to supplement our canned supply of buying cans locally in Springdale.

Q. How about sugar?

A. Sugar we have bought out of Fort Smith to a certain extent.

Q. Now, have you had any shipments from Colorado, into Springdale, Lowell, Fort Smith, or Westville in the past six months?

A. It is very possible.

Q. Well, I am asking you, do you know?

A. I do not definitely know, we do not buy sugar out of Colorado.

Q. You are not supporting any need for sugar out of Colorado?

A. No, sir.

Q. Are you supporting for any other need of service out of Colorado?

A. We do not have any commodity other than labels and dry beans that we are purchasing out of Colorado. [fol. 213] We have labels, dry beans, and potatoes that we are purchasing out of Colorado, we also purchase canned

goods out of Colorado, which we bring to your warehouses and reship.

Q. In the past year what can goods have you purchased?

A. We have purchased shoestring potatoes out from Colorado Springs, Colorado.

Q. Were they moved by the applicant?

A. They were not, they were moved by Steele Canning Company's own equipment.

Q. That was prior to the date when the applicant secured the emergency authority?

A. It was.

Q. Potatoes and beans would be exempt commodities?

A. They are.

Q. They wouldn't be if they were moved with the labels?

A. It is necessary for them to bring labels back on the trucks.

Q. Where did you receive your purchase on the labels in Colorado?

A. We have purchased them from our customers in Colorado.

Q. Would you tell me what points in Colorado?

A. Denver.

Q. Have you shipped any labels from Denver into Springdale or any of these other points recently?

A. I don't recall whether or not we had any labels.

Q. The labels are an LTL movement, are they not?

[fol. 214] A. They are.

Q. And you are not claiming that you cannot get service on labels from—

A. (Interrupting) I am not claiming that, but I am claiming that our customers specify on their orders.

Q. Well, that is because that has been a routine in the past, is it not?

A. That has been our routine.

Q. And it would be perfectly possible to ship them by irregular route common carrier, are they not?

A. Possibly.

Q. Have you ever moved the canned goods out of Colorado Springs by any method other than your own truck?

A. We have not.

Q. Have you ever tried to?

A. No.

Q. You don't know what other service is available?

A. No, sir.

Q. You have never investigated that service?

A. No, sir.

Q. Now, I note from your Exhibit No. 6, you apparently had no shipments in North Dakota.

A. We are operating a few of our own trucks, these are shipments only that Reddish has handled for us.

Q. That's correct.

[fol. 215] Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

By Mr. Jones:

Q. Was not Reddish given authority from North Dakota?

A. Reddish has been given authority and he has serviced points in North Dakota under this authority.

Q. Since July 16?

A. Yes, sir.

Q. Why did you ship by your own trucks during the period covered by Exhibit No. 6, instead of by Reddish to North Dakota?

A. Mr. Reddish did not have sufficient equipment to cover our needs, we were able to maintain a few of our own trucks. After this strike occurred, we used every means to get our orders out.

Q. Now, did you check with any common carrier for service into North Dakota during that time?

A. Yes, sir, I did.

Q. You hadn't checked with Buckingham?

A. No, Buckingham does not have a local office.

Q. Is that the only carrier that you do business with?

A. I tried to do business with the carriers that have offices in Springdale.

Q. Did you check with Jones Truck Lines or Arkansas— [fol. 216] is Arkansas Motor Freight the same as Arkansas Best? Arkansas Best operates from your origin points to Kansas City, does it not?

A. Arkansas Best operates from our origin points with the exception of Oklahoma to Kansas City.

Q. Did you check with them as to whether or not they could connect from Buckingham?

A. I did not check with Arkansas Best because on our movement into North Dakota, the biggest part of it is what we call a "dry land merchandise." That merchandise is packed at Westville, Oklahoma. Arkansas Best cannot serve.

Q. What service?

A. Jones Truck Line to Westville.

Q. Did you check with them as to whether or not they could?

A. Yes, sir, I did.

Q. What was their statement?

A. I did not ask them, but I checked with them as to the possibility of moving a pool—

Q. Oh?

A. LTL business.

Q. Did you check with any other carriers?

A. I did not.

Q. There were from Westville to Kansas City?

A. Campbell 66 service.

Q. Did you check with them as to that possibility?

[fol. 217] A. I did not.

Q. Why did you not?

A. Because I felt like Jones Truck Line knew what they were talking about.

Q. Well, they were speaking for themselves and not Campbell 66, were they not?

A. Yes, but after all there is a limit on the stops that you can have on a common carrier.

Q. To how many stops did you ship these loads to North Dakota?

A. There was either seven or eight stops on that load.

Q. And you knew that Buckingham could serve to all points of North Dakota?

A. I knew from reading the protest at the time I read them, I could.

Q. They claimed?

A. They claimed, right.

Q. You have made, I believe, several truckload shipments into South Dakota?

A. On our shipments into South Dakota, they are usually points also.

Q. Yes, your Exhibit No. 6, is that representative on the type of shipments that you have?

A. More or less representative of the whole thing right here is within on page 2, Chamberlain, Sioux Falls.

Q. That was all eastern South Dakota points, were they not?

[fol. 218] A. Chamberlain fits pretty well into the state.

Q. Well, say from the Mississippi River to the east?

A. I cannot visualize that.

Q. On page 4, I believe, is another one from Watertown, Huron, Sioux Falls, and Sioux City, Iowa?

A. Yes, sir.

Q. And would your testimony be the same, that you have never made any investigation of the possibility of using the Buckingham service into South Dakota?

A. I have not investigated any carrier who does not serve our main headquarters.

Q. And that would apply to all of the various states involved?

A. I depend upon our local carriers there to interline, I do not specify rating on my orders, I depend on them to interline for the best service. I have found out from experience that I do better that way on getting shipments in.

Q. You have never made any attempt to ship to either the Dakotas or Minnesota but through a combination of 66 and Buckingham?

A. I have made no attempt to ship via Buckingham Trucking Line.

Q. In connection with any carrier?

A. No, sir.

Q. Do you know whether or not the service offered by Buckingham would not meet your needs to those particular states?

A. I could not tell you, they do not serve our main points.

Q. Is there anything that you bring from your North [fol. 219] Dakota inbound?

A. On occasions.

Q. What would that be?

A. Oh, we brought potatoes, we brought labels.

Q. From where?

A. Different customers that we deliver merchandise to.

Q. What town?

A. We brought labels from Sioux Falls, Huron, Fargo.

Q. And, again, do you know of any—

Mr. Matthews (interrupting): I am sorry to interrupt, the conversation is getting low down here.

Mr. Jones: I am sorry.

By Mr. Jones:

Q. Would your testimony concerning the labels out of North and South Dakota be the same that you testified out of Colorado?

A. That's correct.

Q. And have you brought anything out of South Dakota, other than exempt?

A. I do not recall any.

Q. And as far as you know there is no other commodity in either of those states which you would receive inbound other than the labels and exempt commodities, would it?

A. No.

Q. Would the same thing apply to Minnesota?

A. No, sir.

[fol. 220] Q. What do you get out of Minnesota?

A. Tin cans.

Q. Have you had any of those shipped in other than your own trucks?

A. No, sir.

Q. Have you made any other than your own trucks?

A. Not out of Minnesota, I haven't.

Q. It would meet your need out of Minnesota on tin cans?

A. There is a possibility there might be.

Mr. Jones: That concludes my examination. May I be excused?

Exam. Hanback: Yes.



**Cross examination.**

**By Mr. Ashton:**

**Q.** Mr. Turnbow, with whom you had conversation about service, did they ever mention Frisco Transportation Company? I am sorry, I owe you an apology, did you discuss with any representatives of Frisco Transportation?

**A.** Seems to me I saw a fellow about your size in my office.

**Q.** Well, then, you did discuss our services. Are you familiar with the services rendered by the Frisco Transportation Company?

**A.** I am.

**Q.** Does the Frisco Transportation Company serve many of the destination points that you have listed or that Mr. Reddish has listed in his application, do you know?

[fol. 221] **A.** Well, many of the points that Frisco services had been eliminated from that because we were able to secure truckload shipments into those points.

**Exam. Hanback:** What do you mean by being eliminated?

**The Witness:** I just left them off.

**Exam. Hanback:** What you had in mind, amended by the application?

**The Witness:** This is true, Mr. Examiner.

**By Mr. Ashton:**

**Q.** Now, those that were named that you have listed under the application as amended, now, what is the difficulty with FTC service to those points?

**A.** There is no difficulty other than the fact that I can get the same service out of the carriers there that I can get out of the transportation company. I do not feel that Frisco Transportation Company can give me the service Arkansas Best and Campbell 66 can give me.

**Q.** Well, now, let's take Westville, Arkansas, for example, from Springdale, Arkansas, the Frisco Transportation Company serves both points?



A. I believe we are getting into an intrastate movement which is not a concern of this hearing.

Q. But you had the Arkansas listed in your application?

A. My understanding, all I know is what I hear, but intrastate movements are not a concern of this hearing, are they Mr. Examiner?

[fol. 222] Exam. Hanback: They are not supposed to be.

Mr. Ashton: Well, there are destination points included.

Mr. Layne: Certainly, I see, but not as expressed in the application.

By Mr. Ashton:

Q. I will take an Oklahoma point, say, from Springdale, Arkansas, to Ada, Oklahoma, do you know that the Frisco Transportation Company has an authority between those points?

A. Yes, sir, my understanding is that Frisco Transportation Company does not have Westville, Oklahoma, in their authority for pickups, is that correct.

Q. Well, I am asking you about a shipment from Springdale to Ada, now is it because the FTC cannot pick up at Westville?

A. That has a bearing on this because we consolidate shipments from Springdale and Westville. Another place, if I may give you an example, that is one of very recent shipments that I had. I had Ada, Oklahoma; I had Wichita Falls, Texas; Vernon, Texas; and Ada, Oklahoma. Wichita Falls, Texas; Vernon, Texas; Memphis, Tennessee; and Lowell, Texas.

Q. On a recent shipment you say?

A. Yes, sir, I don't recall whether this was moved on our own equipment or Mr. Reddish's equipment, I do remember the load.

Q. What did you mean, it was combined, that you filled one truck?

A. One truck with orders from wholesalers in all of those towns.

[fol. 223] Q. And then you deliver partial loads to the towns?

A. That's right.

Q. Now, on that type of service, what is your contractual rate with Mr. Reddish, is it based on a truckload commodity or—

A. It is based on a truckload quantity, it's a 30,000-pound minimum load with a stop charge.

Q. How many stop charges, one or each stop?

A. One for each stop.

Q. What is the rate per hundred pounds?

Mr. Layne: I object—

The Witness (interrupting): I can't quote, I wouldn't attempt to quote.

By Mr. Ashton:

Q. Do you know what the rate is in relation to the common carrier rates for the same service?

A. On that, the rate should be what the common carrier rate is. The man that I have working on the rates specified rates that were in existence in the tariff.

Q. Where you have a movement of that type that's destined to four different points, upon what point is the rate made, the farthest point or the nearest point?

A. Farthest point or the point with the highest rate.

Q. And that's the way the rates with Mr. Reddish are made?

A. That's right.

Q. You say that is the same as a common carrier rates?

A. I can't say that I—they were approved of by the ICC.

[fol. 224] Exam. Hanback: Let's not argue.

Mr. Ashton: I am not trying to argue.

By Mr. Ashton:

Q. You say these rates with Mr. Reddish, as far as you know, are based on the same rates as the common carrier rates?

A. As far as I know, they are.

Q. Do you know that the Frisco Transportation Company has interchange arrangements with other carrier that were permitted in joint line service to serve points in Illinois, Iowa, and other northern states?

A. I am under the impression, yes.

Q. Have you ever used the services of the Frisco Transportation Company for shipment into Illinois?

A. No.

Q. Or to some Iowa point via Kansas City?

A. No, sir.

Mr. Ashton: That's all, thank you very much.

Cross examination.

By Mr. Matthews:

Q. Since the temporary authority application was filed on this docket, have you used the services of Motor Freight Lines?

A. I have not. East Texas Motor Freight does not serve Springdale, Arkansas.

Q. I did not ask you that, I asked you if you have used their services, and your answer is, you have not?

[fol. 225] A. To my knowledge I have not, but it is possible that Jones Truck Line or some other truck line has. I cannot state as to that.

Q. In other words, you have not specified the carrier?

A. I did not.

Q. Do you rely entirely on your carriers all over the United States?

A. I do.

Q. That being the case, I assume you have no knowledge of any shipments on the routes of Western Gillette System?

A. I have read—will you restate that question, please?

Q. Have you since the filing of that authority application in this docket, used the services of the Western Gillette System to any point?

A. To my knowledge I have not.

Q. Are you aware of what services are available on the Western Gillette System?

A. I am not.

Q. And I think you are also not aware of what services are available on the East Texas Motor Freight, you make no attempt whatsoever on checking on the routes of more than one carrier?

A. That is untrue, I check on them with the definite destination points that I have, I check with the common carrier serving our area. If I have a rush shipment that's going to common carrier, I arrange that so as to deliver on a [fol. 226] particular day, I ask them if they could do it, I think I receive the faster service from them. I do that because if something happens to that shipment, I go back to the originating carrier of them, trace it through, I depend on them for it. I have found that they can do more about rushing a shipment through than I can if I route it. In the past I have routed shipments—it's been a good many years since I did—I found that that was not satisfactory. I have been told about a local common carrier, that they could get the shipment through faster, they have certain trailers on their route they have to interchange with those people in order to get prompt service. That's a very economical way for them to operate. All I am interested in is service, and I didn't care how they get it as long as they give it to you.

Q. Well, if the records show that there is over the routes of Arkansas Best, you wouldn't know anything to the contrary, would you?

A. No.

Q. And you think it's quite possible that you might have used that service in the past?

A. It's possible, some of our shipments have wound up on West Texas Motor Freight, I don't say that he had and I don't say that they had not.

Q. Now, in your direct testimony, you made the statement that LTL rates of regular route common carrier are prohibited, what do you mean by "prohibited"?

[fol. 227] A. I mean those rates on certain occasions are two and three times as high as the truckload rate; therefore, on these cheap commodities which we pack, if that rate is packed on our transportation cost, it throws our commodities out of the competitive market.

Q. Then I think you don't understand. You think that your smaller shipments should be good on a truckload rate?

A. I certainly do if they can be combined on truckload quantities.

Q. Is it your opinion that you cannot ship a combined load and get a regular rate on the common carrier?

A. It is true in many instances that I am—

Q. (Interrupting) Let's have one of them.

A. All right, sir, say I have a shipment going to Chicago, Illinois.

Q. From where?

A. From Springdale, Arkansas. On that shipment I will stop in transit for partial unloading at Canton, Illinois, at Macomb, Illinois, and Petersburg, Illinois. We have existing customers in all of those points. I can load that truckload on Jones Truck Line, I can load it on Campbell 66, any of the truck lines, Frisco, any in that area, they in turn have to interline. I have got Petersburg sitting over here in a little town about the size of crossroads, I have got Macomb, that is larger, but they have to interline again and tear it down in LTL shipment.

[fol. 228] Q. What difference does it make if it's an LTL shipment or truckload?

A. It makes a great deal of difference.

Q. Well, what?

A. We can do that. Today is Monday, I can load out a truckload this morning with these points all along it. It will begin delivering in that area tomorrow morning, our customers get the service that they need, they get the benefit of truckload shipments.

Q. What do you mean by the benefit of it? In other words, you understand the service there by regular route carriers, but you want truckload service. If the shipment gets there, what difference does it make?

A. It makes a lot of difference as to the time it gets here. We may sit here for—say the Petersburg point, we may sit there for a month before we can find out a point of that area, by that time our customer is out of merchandise, he looks for somebody. If I ship it LTL, it may take two weeks for it to get there.

Q. Simply because it's an LTL shipment?

A. Yes, simply because it's an LTL shipment.

Q. Now, getting back to what you mean by prohibited rates on LTL shipments, would you explain on this particular example of Chicago, the destination Chicago with

Canton, Illinois, so-called stops. Just what is prohibited about LTL rates there, what do you mean?

[fol. 229] A. Well, do you want—what was the size of the shipment from Canton?

Q. Anywhere from nine to ten thousand pounds, say.

A. Your LTL rate, which I have stated before, is generally two or three times as high from the truckload rate to the point. That rate must reflect in the cost of the canned goods when the wholesaler puts them out to the retailer. We have competitors in our area who are offering service by their own private carriage just as we have done in the past. Our customers can get that service, we must have the same service, all we want with E. L. Reddish is to take over our transportation department.

Q. Let's try to limit our discussion now to this prohibited LTL rates.

A. I think I have qualified that.

Q. You have a 3,000-pound shipment going to Canton, Illinois. Now, you say that the reason that these LTL rates are prohibitive because you have a shipment to Canton because of the three times as much as it would be on a three times load?

A. I did not say that.

Q. I am trying to get the theory.

A. That's all right.

Q. Actually, when this strike is settled, you won't need the service of Reddish, will you?

A. I don't know when the strike will be finally settled; [fol. 230] as I stated previously, our intention is to go out of the private carriage business.

Q. Regardless of the strike?

A. Regardless of the strike.

Q. That strike has no bearing on the application?

A. It does.

Q. Well, you have temporary authority, I am talking about the temporary authority.

A. Yes.

Q. You want the permanent authority regardless of the strike situation, that's my question?

A. Yes, I do, I want to go out of the transportation business.



Q. Now, did you make any shipment in the last year to El Paso, Texas?

A. Yes, sir.

Q. Who to?

A. We made shipments to Food Mart, El Paso.

Mr. Layne: Do you have any objection to naming your customers?

The Witness: No.

A. (continuing) Well, F. I. Adeltorra or something like that. There are several small customers in El Paso.

Q. What service did you use out there?

A. We used our own truck.

Q. Do you have a situation in El Paso that you have [fol. 231] in many other points?

A. We stop the trucks all along because as a general rule we don't have a full truckload for El Paso, Texas.

Q. That is since the strike started?

A. I would say under the normal procedure that it has—that we have delivered down there since the strike started. We normally deliver down there every so often.

Q. Now, let's limit our discussion to the time since the strike started. What about shipments to Houston, Texas?

A. We make shipments there.

Q. And do you use your own trucks there?

A. We have used our own trucks. I can't say definitely, but I feel sure we have used Reddish's. We also have pool shipments into Houston, Texas, we stop.

Q. By what carriers?

A. On our own trucks, Mr. Reddish's trucks.

Q. Those are the only two?

A. Yes, sir.

Q. What about Odessa, Texas?

A. We go there.

Q. Did you have shipments in there since the strike started?

A. I don't recall the shipment in there, but I feel sure that we have. It would be Reddish's or our own trucks. It would depend on the size of the order and what it would be necessary for us to pool the order with and to get it out.

[fol. 232] Q. Well, do you know whether or not you are

using the regular route common carrier since the strike started?

A. I do not recall that we have used any regular route into Odessa.

Exam. Hanback: Can't you limit your question, rephrase your question, any point in Texas?

Mr. Matthews: I will ask that, Mr. Examiner.

By Mr. Matthews:

Q. Have you used any regular route common carrier service into any point of Texas since your strike started?

A. Yes, sir.

Q. Where?

A. Dallas, Texas.

Q.

A. Yes, sir, Jones Truck Line.

Q. You use trucks and that is single line service?

A. Yes.

Q. Any other points?

A. I don't recall any other points.

Q. All right. What about Oklahoma, have you used any regular route service into any point in Oklahoma since your strike started?

A. Yes, Tulsa and Oklahoma City.

Q. What carrier?

A. Jones Truck Line.

[fol. 233] Q. That is single line service?

A. That is single line service.

Q. Have you used any regular route carrier into Kansas since your strike started?

A. Yes, sir.

Q. What points?

A. We have shipped to North Kansas City, and if I am not mistaken, we have shipped to Wichita.

Q. Whom did you use?

A. The shipment originated with Jones Truck Line. I don't know whether it was for Wichita or not.

Q. Do you have any idea what the time in transit was?

A. I do not, no, sir.

Q. What about the shipment down to Dallas, do you have any shipment?

A. On this we are not even asking for Dallas in this application, he is not asking for Dallas, he is not asking for Tulsa and Oklahoma City.

Q. In other words, you want the services of Reddish principally which you know of the common carrier?

A. No; a large extent, that's correct.

Q. And that's because of—let me ask you why that is.

A. The main reason, as I have specified before, we need the faster service in there and we also need a competitive rate, but we have had this situation on interlines. [fol. 234] We pack some fifty or sixty different items, for example, at times. We have fifty and forty different items in a truckload, we may have orders for four or five customers in that truckload on these pool shipments. When that merchandise is interlined, especially if it's shifted from one trailer on the other, when it gets to our wholesalers, we have one awful time getting their merchandise straightened out. This past month we—I have had complaint. We had one customer that told us any time we shipped his order in a pool load, ship it on our trucks so it wouldn't be messed up.

Q. Well, it wouldn't be messed up in their trailer, would it?

A. It would be possible.

Q. How?

A. All right, sir, you are—

Q. (Interrupting) Excuse me. Let's assume that you have two regular route carriers in the movement, and if you had a trailer that is loaded half your dock and which moves through to Houston, Texas, and is delivered to several people in Houston, Texas, now, explain to me how that shipment is going to be mixed up.

A. At the time that you get thirty or twenty-five 8-ounce No. 1's, No. 300, No. 303, No. 3 squats, No. 3 tall, and No. 109.

Now, on that there will be several orders in this truck. We have had complaints on common carriers, when they would go in to unload, merely because the dock men who loaded the load and unloaded the load were different and got

[fol. 235] the things messed up, and I have had claims on end trying to find these commodities.

Q. The unloading is done by the common carrier, is it not?

A. Well, now, I don't know whether it is done by the consignee or not.

Q. But he is not unloading it, is he, does the consignee unload that merchandise? I am talking about the customer when the trucks pull up.

A. Then they take the merchandise at their door, that merchandise is unloaded by either a driver or a dockman.

Q. Do you use any common carrier service in the State of Illinois excluding Chicago since your strike began?

A. Yes, sir, I have.

Q. To what points?

A. We have used common carrier service to Springfield, Illinois; Champaign, Illinois; Peoria, Illinois; Quincy, Illinois; those I recall, there are probably others which we have also.

Q. O.K. What carrier?

A. I have used Jones Truck Line that I specifically recall.

Q. You use—

A. (Interrupting) Jones Truck Lines is a block from our offices.

Exam. Hanback: We will take a five-minute recess.

Mr. Matthews: That is all I have.

(Short recess.)

Exam. Hanback: The hearing is resumed.

[fol. 236] Cross examination.

By Mr. Gunn:

Q. Mr. Turnbow, does your company or you have any interest in Mr. Reddish's company?

A. No interest whatsoever.

Q. Have you ever—has your company ever loaned him money?

A. No, sir.

Q. Did you or your company send your drivers to him to work for him?

A. No, sir.

Q. You mentioned the strike. How long has the strike been going on now?

A. The strike began, I believe it was June the 1st.

Q. Are these drivers a member of the union?

A. They are.

Q. Could you tell me the name of the union?

A. Teamsters' Union No. 823, Joplin.

Q. And has any federal board intervened?

A. Yes, sir, the Federal Mediation and Conciliation Service sent a man down to help iron out the difficulties.

Q. Now, is there any desire on your part to see the strike end?

A. There most certainly is.

Q. For what reason, sir?

A. Well, mainly because of piece of mind and tranquility.

Q. Would you use your trucks again if the strike does end?

A. No, sir, we did not have the equipment that we had [fol. 237] at one time.

Q. I see.

A. We had equipment under lease that we no longer have under lease because our S.R.'s cancelled out on us. We don't have equipment available.

Q. You propose to go out and hunt more equipment?

A. No, I have stated previously that I want out of the transportation business.

Q. Is it your desire to have a single service?

A. It is very advantageous in our operation.

Q. In that case, you would hope to eliminate any interchange?

A. That is correct, on this thing. Let me qualify that if I may. I don't object to an interchange on straight truckload quantities or anything that doesn't cause us confusion on the other end.

Q. But if Mr. Reddish is granted his authority, you would see the possibility of any interchange being eliminated, would you not, sir?

A. No, sir, I am shipping by the common carrier. Now, I intend to continue at points where I can get the service.

Q. Have you ever used the service of LA Trucker Truck Lines that you know of?

A. To my knowledge I have not.

Q. You don't know whether LA Truck Lines could give you overnight service, say, from Memphis to Cape Girardeau?

[fol. 238] A. Well, I know they cannot give us that service from Springdale to those points. I will admit this, we can get overnight service, that's what we are accustomed to at Cape Girardeau at those points.

Q. And the same answer would be true?

A. It would.

Q. And as to—what would your answer be, the same, as to Cairo, Illinois?

A. It would, but those are points that can be served out of Springdale on overnight service.

Q. You have certain peak seasons during your business?

A. We did have peak seasons.

Q. When are those seasons, sir?

A. Well, I enumerated those before. We have certain seasons on green beans, spinach, grains, when the crops come in. And those seasons vary on exact pounds from year to year depending on growing conditions.

Q. Would you expect Mr. Reddish to serve you exclusively, your company exclusively?

A. No. On this application he has applied for Steele Canning Company, Keystone Packing Company, and Cain Canning Company, I do expect him to dedicate his equipment and services to those three people.

Q. Now, you state some of your competitors that have their own truck lines or use their own equipment, are those competitors in your immediate area?

[fol. 239] A. Yes, sir.

Q. Could you give me the names?

A. Alma Canning Company in Alma, Arkansas; Allan Canning Company, Siloam Springs, Arkansas; Forest Park Canning Company at Fayetteville, Arkansas; Stillwell Canning Company at Stillwell, Oklahoma; Fresh Canning



Company at Spiro, Oklahoma; Good Canning Company at Fort Smith, Arkansas.

Q. Do you know whether any of these competitors use common carrier service?

A. All I know is what they have told me. If you want that I will give it to you. They have told me that they use common carrier service on their state service equipment in many instances; on the other shipments they do the same as we do, they use their own equipment.

Q. Do they serve approximately the same area that you serve?

A. You are asking something that's rather guarded in canning service. We don't disclose to other canners, but on this thing we know from experience because at times we have labels from customers, he will send labels to us so we know in lots of instances those they are serving.

Q. But you do know if these competitors are covering the immediate area that you do?

A. I cannot testify as to the complete area that a competitor covers.

Q. Have you—you have had some backhaul shipments [fol. 240] using Mr. Reddish, have you not, since his authority expired, temporary authority?

A. I stated a few minutes ago that we have had some backhauls on dry beans and potatoes. We have not had any backhauls on other than exempt commodities.

Q. Have any of them labels of the company?

A. They have not.

Q. I see.

Mr. Gunn: That's all I have, thank you.

Cross examination.

By Mr. Durden:

Q. Mr. Turnbow, you stated that your company was still on strike. The strike still is in existence, that is correct?

A. That is correct.

Q. Is the picketing still going on at your plant?

A. No.

Q. When did that cease?

A. I don't remember the exact date on that, but the picketing ceased four days after it began.

Q. And how many inbound shipments of merchandise have you received since your expiration of Mr. Reddish's emergency authority, do you know? How many loads of inbound?

A. I cannot tell you specifically.

Q. Have you received any inbound merchandise?

A. We have received inbound merchandise, and by mer-[fol. 241] chandise I am referring to potatoes and whatnot.

Q. Have you received anything except exempt commodities?

A. We have not.

Q. Mr. Reddish has not delivered anything to you other than exempt commodities and either has any irregular common carrier, is that correct?

A. No, we have had common carriers deliver merchandise.

Q. That is what I am asking you, have you received inbound shipments since the expiration of Mr. Reddish's emergency authority?

A. We have received labels inbound since expiration of that authority, we have had cans switched by rail from the Company in Springdale to our factory and to our warehouse.

Q. Do you have any idea of the volume of the inbound shipments you have received since the expiration of Mr. Reddish's emergency authority?

A. Without my records I can't.

Q. Can you give us some approximation?

A. No, I can't give you an accurate approximation.

Q. Have you received any cans?

A. We have received cans from Heekin Can Company at Springdale. We have also received cans on our own trucks from the various points which we purchase cans.

Q. You purchase from Smith?

A. We did not purchase cans at Fort Smith.

[fol. 242] Q. Does the American Can Company operate there?

A. It is my understanding that the American Can Com-

pany is now operating. They will close out as of January 1.

Q. Have you received any cans from Fort Smith?

A. No, sir.

Q. Received any boxes inbound since the expiration of the emergency authority?

A. We have received boxes inbound.

Q. How many loads of boxes have you received?

A. Oh, three or four to my knowledge, it's possible that there has been a good many more that I haven't seen.

Q. Anything else that you have received to any quantity, sugar or—

A. No large quantity, no, sir.

Q. In other words, it hasn't been a great deal of necessity for any backhaul since this emergency expired?

A. As I said before, between season operation.

Q. You did state, I believe, a while ago, either on direct or cross, that you had used some of your own equipment for some shipments, that is correct?

A. That is correct.

Q. And where were those shipments to?

A. To various points in the United States.

Q. About how many shipments have you made on your own equipment?

Exam. Hanback: During what period?

[fol. 243] Mr. Durden: Since the emergency authority expired.

The Witness: Well, we were operating, for example, the trucks. The trucks will average two trips a week.

By Mr. Durden:

Q. And why was it necessary for you to use your equipment?

A. Because Mr. Reddish did not have sufficient equipment to take care of our needs and we could not expect him to buy on emergency and temporary authority.

Q. How many pieces of equipment does he have now?

A. Nine pieces to my knowledge.

Q. Same number that he had at the previous hearing?

A. Yes, sir.

Q. Have you—are you generally familiar with the operating authority of Arkansas Best Freight System?

A. To a certain extent, yes, sir.

Q. Have you offered Arkansas Best Freight System any freight at all since the previous hearing on July 23?

A. No, we have inbound on labels on Arkansas Best, which we have had for years. I have not offered them.

Q. You don't control the inbound shipments of labels, do you?

A. In certain instances we do.

Q. Do you specify to the shipper?

A. We specify to the label companies that we buy for how these labels are to be shipped.

Q. They are not bound to that?

[fol. 244] A. They are bound.

Q. They honor your request?

A. They honor our request, yes, sir.

Q. Except for inbound shipments?

A. Except for inbound shipments.

Q. Mr. Turnbow, except for these few inbound shipments of labels that you have received from Arkansas Best or by Arkansas Best Freight System, have you used their services in any other way since the last hearing?

A. Not since the last hearings, no, sir.

Q. Have you used Arkansas Best to any great extent before the last hearing?

A. No, sir, I used Arkansas Motor Freight when it existed as such.

Q. Arkansas Motor Freight—

A. (Interrupting) When Allen was at Freights and called on us we did use him to a certain extent.

Q. Now, you mentioned that Jones Truck Line was about a block from your plant?

A. From our office.

Q. From your office, not from your plant?

A. No, sir.

Q. Does the Jones Truck Line—I believe Jones Truck Line is a corporation, is it not?

A. They have, I guess they are.

[fol. 245] Q. Is the Steele Canning Company a corporation?

A. It is.

Q. Does the Jones Truck Line own any stock in the Steele Canning Company, Inc.?

A. They cannot.

Q. Does Mr. Harvey Jones own any interest in the canning goods?

A. He does not.

Q. Does the Steele Canning Company own any interest in the truck line?

A. He does not, no interest whatsoever.

Q. None whatsoever?

A. No, sir.

Mr. Durden: That's all for the moment, please.

Exam. Hanback: Mr. Eyster?

Cross examination.

By Mr. Eyster:

Q. Mr. Turnbow, directing your attention to Exhibit No. 6, Load No. 3, on page 2. Does the shipment to Freeport, Illinois, with stop-offs at Rockford and Joliet, is it your intention, sir, that you do not have common carrier service for that load?

A. It is possible that some common carrier service might be had for that load.

Q. If it were shown to you that there was a common carrier service, would you only use that on the interchange, would you use—

[fol. 246] A. I don't have any objection to using common carrier any time to take care of our needs.

Q. Using the example that you used before, truck to Chicago and several stops intermediate thereto, one of them being Petersburg, I believe, what is the mileage from Springdale, Arkansas, or one of the other origin points to Petersburg, have you any idea, sir?

A. I could give you an approximation, I would say roughly four hundred, four hundred fifty miles, maybe not quite that far.

Q. Where is Petersburg located, sir, in connection with some major point in Illinois?

A. It's not too far from Springfield, it's on a little road that goes over between Springfield and Peoria.

Q. What is the mileage?

A. Three hundred thirty-five miles.

Q. Three hundred thirty-five. Is it your intention, sir, that the Mr. Reddish would give you next morning service from Springdale, Arkansas, to Illinois?

A. His truck leaves at 3:30 about, a two-man operation, I see no reason why he could not.

Q. He has a two-man operation?

A. Yes, sir.

Mr. Eyster: No further questions.

Cross examination.

By Mr. Bazelon:

Q. How many units is he presently operating?

[fol. 247] A. Eight units.

Q. Now, if you took your total outbound tonnage as 100 per cent, how much of it would go by truck and how much by rail?

A. Ninety-nine per cent of it by truck.

Q. Other than 99 per cent prior—

A. (Interrupting) Maybe 100 per cent. That's something that you can't—you never know from day to day what your customer is going to request. It's unusual, but it's a very strong probability.

Q. Well, let's take 1957 as an example. Now, what would it be for '57?

A. Well, we shipped some rail cars to a customer of ours, I don't recall how many we shipped.

Q. I am not asking for the exact amount if you took it or 100 per cent, how much by rail and truck?

A. I would estimate, I am not trying to give exact figures here, but I would estimate in 1957, probably that, oh, somewhere between 95 and 97 per cent went by truck.

Q. Now, other than 95 or 97 per cent, how much of it moved, and I am talking only on interstate traffic, how much of it moved in your own private fleet operation



which would include the units that you leased from Mr. Reddish?

A. I would say practically 80 per cent of it, 20 per cent by common carrier trucks.

Q. It would be slightly less?

[fol. 248] A. Slightly less what the figures are.

Q. Now, how long has it been that, generally speaking, that you shipped 80 per cent of your traffic by your own private operation?

A. How long?

Q. How long has it been since this pattern of 1957 has been in effect?

A. Well, the pattern began as I testified at the last hearing. We started getting in that back in 1948 and gradually, little by little, we got into the private carriage business through necessity.

Q. I am not asking you all that, I am asking you how long has it been that you have been transporting outbound traffic in your own vehicles?

A. Well, that is something that progressed through the years, and I imagine approximately 80 per cent of it.

Q. If we went back one year in '56, would it be the same?

A. It might be a little less than that.

Q. Now, of the remaining 15 per cent or so, how much of that was truckload traffic and how much was by LTL?

A. There are very few LTL shipments, and truckloads with one or perhaps two stops in that.

Q. You consider those to be truckload shipments?

A. Well, I generally refer them the last truckload shipments, if they are points that can be delivered by the car-  
[fol. 249] rier or connecting carrier.

Q. So that the 15 per cent or so which went common carrier was substantially all truckload traffic?

A. That's right.

Q. Did you transport truckload traffic on your own vehicles?

A. Yes.

Q. What percentage?

A. Oh, three or four per cent.

Q. Now, again, of the 15 per cent or so that went common carrier, how much of it went by Jones?

A. Oh, a large portion of it, probably nearly all of it, in fact.

Q. In other words—

A. (Interrupting) Practically the entire amount originated for Jones.

Q. Now, was that pattern true in 1958 up until the strike?

A. Yes, sir.

Q. Then when the strike—strike that. Has the pattern changed any since the strike other than the fact that now Mr. Reddish is a factor as a carrier rather than as a part of your private fleet?

A. Mr. Reddish has picked up what he could as a portion that our trucks could not handle, our movement by common carrier has not changed substantially one way or the other.

Q. So that substantially still 80 per cent of your outbound [fol. 250] traffic moves either in your other movement or Mr. Reddish and the balance, 15 per cent or so, goes by Jones?

A. In 1958, closer on per cent by Jones, we were talking about 1958 when you began this.

Q. In other words, you made very few, if any, shipments?

A. That's right.

Q. Now, on the inbound traffic, taking again, say, 100 per cent of inbound traffic on interstate, how much of it is by rail and how much by truck?

A. Practically all of it is by truck.

Q. All right, now, again of the inbound shipment, how much of it moved in 1957 by your private operation and how much of it moved by the common carrier?

A. Practically all of our private operation.

Q. Would you say there was no shipment of less than per cent moved by common carrier?

A. Oh, I would say less than two or three per cent.

Q. And is that pattern been true for sometime?

A. That's right.

Q. And has the pattern remained in 1958 the same other than the fact that Mr. Reddish now serves you for hire carrier as part of your private operation?

A. It remained the same.

Q. And since that time you haven't had any movement inbound other than that which—

[fol. 251] A. (Interrupting) We have bought locally and hauled our own trucks.

Q. Now, on the inbound traffic, I understand that you select the carrier but have been selecting yourself, is that right?

A. On inbound traffic?

Q. Yes.

A. We route our inbound traffic.

Q. And you route it on your own line so to speak?

A. Yes.

Q. Now, I notice on Exhibit No. 36, I notice there were no shipments to California, is that correct?

A. There has been shipments since that time.

Q. And has that gone through your own private operation?

A. Mr. Reddish has made shipments to California since this.

Q. Have you ever used common carrier to California to your knowledge?

A. We have used rail in the past to California on occasion.

Q. Well, I am talking about motor carrier.

A. No, we have not used common carrier except Mr. Reddish.

Q. Is that true of New Mexico, or have you shipped to New Mexico?

A. We have shipped to New Mexico, we have not used common carrier connection in New Mexico.

Q. Now, have you ever used common carrier service to Arizona points?

A. We have not.

[fol. 252] Q. How about to Minnesota points?

A. We have.

Q. And who would that be?

A. Jones originated the shipment.

Q. How about to Iowa?

A. We have.

Q. That again would be Jones?

A. That's correct, they originated the shipment.

Q. How about to Nebraska?

A. We have.

Q. Again that would be Jones?

A. Yes, sir.

Q. And you do not know what carriers were interline with those shipments?

A. I don't, it's probably in the record someplace.

Q. Now, likewise, I understand that you do not know whether or not you ever used the services of Watson Brothers Transportation Company or Centralwise Transport Company, is that correct?

A. I do not know.

Q. That's correct?

A. That's correct.

Q. Now, I judge that you have not used Watson Brothers Transportation Company on any shipments originating in California, Arizona, Colorado, Iowa, Nebraska, New Mexico, or Minnesota, is that correct?

[fol. 253] A. To my knowledge we haven't.

Q. You were discussing with Mr. Jones an inquiry that you made with Mrs. Loving?

A. That is correct.

Q. From Iowa, and Illinois, shipments westbound?

A. That's right.

Q. Were those shipments made?

A. They were.

Q. Did you use your own trucks?

A. On one of the trucks I signed out by Jones after I talked to Miss Loving, we had a call from our customer to other points that had the merchandise advertised and had to get it in there Monday morning, so I put it on our truck so they would have it.

Q. Do you receive any merchandise other than exempt commodities from New Mexico?

A. I don't recall any that we have received other than exempt commodities.

Q. How about Arizona?

A. I don't recall any in Arizona either.

Q. How about in California?

A. Yes, we do receive canned goods from California.

For example, we receive tomato paste that we use to manufacture (sic)

Q. Where is that origin?

A. We buy from different people in California, there [fol. 254] are various tomato packers out there. We buy from those that are most (sic)

Q. And moved by your own equipment?

A. It is.

Q. Are you and the applicant entering into—are they based on a one-way movement or two-way movement?

A. I don't know what those rates are based on. Smith had them to the ICC and I can't quote the rates without the tariff.

Q. I am not asking what the rate is, I am asking you whether or not the amount that you paid is computed on one-way basis or on the two-way basis?

A. The rate that we pay is the rate specified in the tariff.

Q. Do you pay them if the applicant comes in—

A. We pay for the outbound movement.

Q. But not for the inbound movement?

A. He hasn't rendered the service for us.

Q. So I gather that you don't pay him?

A. No, if we didn't render service.

Mr. Bazelon: I believe that is all I have.

Mr. Ryan: No questions.

Mr. Hayes: No questions.

Exam. Hanback: Any further cross-examination?

(No response.)

Exam. Hanback: Any redirect?

Mr. Layne: No, sir.

[fol. 255] Exam. Hanback: Thank you, Mr. Turnbow, you are excused.

(Witness excused.)

[fol. 256] Mr. Layne: I would like to call Mr. De Wese.

LARRY DE WESE was sworn and testified as follows:

Direct examination.

By Mr. Layne:

Q. Would you please state your name for the record?

A. My name is Larry De Wese.

Q. And would you give your business address and your business affiliation?

A. I am President of Cain Canning Company, Inc., which is located at Springdale, Arkansas.

Q. Does the Cain Canning Company have a plant located at Springdale, Arkansas?

A. We do have a plant located at Springdale. We also have a warehouse in connection with the plant.

Q. Do you have any plants or warehouses any other points than Springdale, Arkansas?

A. We do not have any plants other than at Springdale, Arkansas.

Q. Is this plant and warehouse within the city limits?

A. It is, it is on Highway 71, north.

Q. What do you produce or what does the Cain Canning Company produce at the plant at Springdale, Arkansas?

A. The Cain Canning Company produces canned vegetables. We can green beans, spinach, turnip greens, mus-[fol. 257] tard greens, kale, chard, greens, and sweet potatoes.

Q. Now, are these products all in metal cans?

A. They are all packed in metal containers.

Q. How are they shipped, in what amounts, or are they shipped in boxes, for example?

A. They are all shipped in boxes, regular canned goods boxes, cases.

Q. As far as Cain Canning Company is concerned, do you ship any canned goods in boxes other than from the plant at Springdale?

A. No, we do not.

Q. Now, can you give us some estimate of the volume of production of canned vegetables, all of the vegetables produced by Cain Canning Company in any period of time, such as a month, a quarter, or a year?



A. Well, our production, of course, will vary according to our growing seasons, but as a rule our production will run approximately 500,000 cases a year, anywhere from 500,000 to 600,000 in a normal year.

Q. How many cans to a case?

A. That depends entirely on the size. The majority of our merchandise is packed in No. 303 size, which is twenty-four cans to a case.

Q. And do you have a rule by which you calculate the weight so far as the cases of canned goods are concerned?

A. Well, roughly 1,000 cases to a truckload.

[fol. 258] Q. And a truckload is how many pounds?

A. Approximately 5,000 pounds. The 303 size runs about thirty pounds a case, and that is the big volume.

Q. Now, to what companies or to what types of purchasers do you sell your canned goods?

A. Prior to the time that Steele Canning Company had their labor troubles we were selling approximately 85 per cent of our products to Steele Canning Company.

Q. Now, on the sales to the Steele Canning Company, who arranged for the transportation for that particular 85 per cent of your production?

A. The arrangement for the transportation out of the 85 per cent that was sold to the Steele Canning Company was made by Steele Canning Company.

Q. Steele Canning Company. What truck lines or what transport?

A. They arranged for the transportation and advised us as to how the merchandise was to be transported.

Q. Now, as to the remaining 15 per cent or the remainder after the sales to Steele, to what customers was that sold?

A. The biggest part of the remaining amount was sold to other canners.

Q. And as to that transportation, who arranged for the transportation?

A. As a rule the buyer picked the merchandise up from our plant with their own truck. We do not have any trucks [fol. 259] on which to haul interstate shipments.

Q. Well, prior to the strike then or prior to Steele's labor difficulties, did you arrange for the transportation of any of your products?

A. I'm sorry.

Q. Prior to Steele's labor difficulties sometime in June, '58, I believe the record will show, did Cain Canning Company arrange for or direct the transportation of any of its products?

A. No.

Q. Did Steele Canning Company ever have any of its own operating trucks or equipment for transportation prior to June, 1958?

A. I'm sorry.

Q. I'm sorry. I should ask you this, did Cain Canning Company have any vehicles operating in the transportation of your products of Cain Canned goods prior to June of 1958?

A. No, sir.

Q. Do you have any at the present time?

A. No, sir, we do not.

Q. Now, are the facilities of your company in Springdale located on a rail siding?

A. No, it is not.

Q. All of your shipments from your plant have been arranged in the past by truck?

A. They have all been by truck.

Q. Now, did the labor difficulties that occurred at Steele [fol. 200] Canning Company affect your operation?

A. The labor difficulties affected our operation because Steele Canning Company, of course, was our biggest customer. In other words, we were moving approximately 85 per cent of our production to Steele Canning Company. When Steele Canning Company started having trouble in making shipments, naturally they moved less of our merchandise, they bought less merchandise from us, which has resulted in their having on hand right now the biggest inventory that we ever had.

Q. Can you give us an estimate of any increasing amount of your inventory that your company now has that you consider abnormal?

A. I would say that they had been moving approximately 12 to 15 per cent less of our merchandise, that they have bought that much less merchandise from us, which has amounted to, in a period of a year's time, approximately 60,000 or 70,000 cases.

**Q.** Now, did your company itself become indirectly involved in any difficulty arising out of the Steele situation?

**A.** Yes, we did. We were picketed at the same time the Steele Company was picketed, and we were able to get an injunction removing the pickets from our plant.

**Q.** Now, your products that are now being sold to Steele Canning Company, to your knowledge, how is it being shipped?

**A.** The products that they are selling are now being transported on Cain Canning transporting trucks and on the [fol. 261] private carrier's trucks, Reddish.

**Q.** Are you continuing to sell products to other canners?

**A.** We are, and since Steele has had this difficulty we have tried to sell merchandise to customers in order to pick up this surplus merchandise that we have on hand that we haven't been able to sell to Steele Canning Company. We have not been too successful in moving this merchandise to customers because there are very few customers that buy full truckloads and we don't have any way of moving less truckloads.

**Q.** In your sales direct to customers do you compete with other canning companies?

**A.** Yes, we compete with other canners.

**Q.** Were you in the room when Mr. Turnbow named some of the competing canning companies in Arkansas and eastern Oklahoma?

**A.** Yes, sir, I was, and those are the same companies, of course, that we compete with.

**Q.** And in soliciting the sale of your products to the customers, is transportation any factor in soliciting these sales direct to the customers?

**A.** The way that all of our customers buy now they buy on a very close margin and on a very rapid turnover, and one of the first things that they want to know is when they can get delivery of merchandise.

**Q.** Have you been successful in expanding your sales direct to customers to make up for any lack in purchase by [fol. 262] Steele Canning Company?

**A.** We have been able to make some sales direct to customers.

Q. And what transportation service have you used in making those sales?

A. John's Truck Lines handles practically all of the sales that we have made.

Q. And is that truck line located in Springdale, Arkansas?

A. It is located in Springdale.

Q. Have you had any difficulties in making or any limitations in making sales direct to customers?

A. Well, as I stated earlier, I have not been able to accept small orders because I do not have any way of moving these small orders in truckload shipments.

Q. Do you support the application of E. L. Reddish?

A. We do, yes.

Q. Can you tell us why you support the application as far as it relates to canned goods produced at Springdale, Arkansas?

A. One of the main reasons is, of course, that we support this application in behalf of Steele Canning Company, because if we can't sell our merchandise to Steele Canning Company we are in bad repair. The other reason that we support this application is that we feel is we had the service that we are trying to get through E. L. Reddish that we will be able to develop sales of our own and not be dependent upon them to move all of our merchandise. We have found [fol. 263] out since Steele has had this labor trouble that we had our necks stuck way out.

Q. Now, do you expect E. L. Reddish to dedicate a portion of his service or his equipment concerning you if his application were granted and you were one of the companies named?

A. If the application is granted we would expect E. L. Reddish to handle our shipments for us, give us the kind of service that we will need in order to make these sales we can to the customers.

Q. Do you have any opinion, Mr. De Wese—strike that. How long have you been in the canning business?

A. I have been in the industry for eighteen years.

Q. Do you have any opinion, Mr. De Wese, as to what courses of action are available to your company in the event that you do not pertain, or in the event the application of

Reddish is not granted so that he is unable to perform the service, do you have any opinion as to what your company may do or will do?

A. If Mr. Reddish's application is not granted I do not see that we have any alternative except to get into the private carriage business. We don't want to, we would rather not buy any trucks, but if this application is not granted I don't see that we will have any alternative. The way the wholesale grocers are buying canned vegetables today, I do not believe it is possible for a canner to stay in operation without having some way, some method of making private carriage deliveries because the quantities bought are too small.

[fol. 264] Q. Now, Mr. De Wese, can you tell us at the present time as far as the sales direct to customers are concerned of canned goods produced in Springdale, where are the customers located that you are serving at the present time?

A. The sales that we have been able to make since the time that Steele ran into labor trouble have been to primarily points which are served by one carrier, such as Kansas City, St. Louis, and Chicago.

Q. And in what volume have those shipments been?

A. Well, the volume hasn't been very large because, as I stated earlier, Steele was taking about 85 per cent of our merchandise before the trouble started. And now instead of the 85 per cent they normally took we have not been able to move 10 per cent.

Q. Now, Mr. De Wese, I was speaking of what size sales are made by you at the present time direct to customers to these points.

A. Well, the only choice that we have had are in straight-load shipments, and we have had some shipments that we have had two or three deliveries in one truck, but ordinarily it is a straight-load shipment to one customer.

Q. Mr. De Wese, if you are to sell your products of the canned goods that you produce at Springdale, Arkansas, direct to customers, where are those customers located?

A. We would be selling to the same customers that Steele [fol. 265] Company is now selling to and they would be located in the same territory. In other words, at the present

time we can't sell to those customers because we don't have any way of making delivery of their small orders, but if we have the service that we are hoping to get from Mr. Reddish we will be able to sell to those other territories and make delivery.

Q. Are these customers familiar with the products or the type of goods produced by the Cain Canning Company?

A. The customers are familiar with our products, because a lot of our customers know that the merchandise that they have been receiving has actually been products from our plant. We have had the customers come to visit us and we have shown them through our plant.

Q. In the event the application of E. L. Reddish would be granted and the Commission should permit Mr. Reddish to serve the Steele Canning Company, provide service for the company, do you anticipate continuing to sell your product to Steele Canning Company?

A. I feel we would still continue to sell a large portion of our products to Steele Canning Company, but I do not think we would as much as we have in the past.

Q. And what is the reason you wouldn't sell them as much as you did in the past?

A. Well, we are attempting to promote sales of our own so we won't be dependent on another company.

[fol. 266] Q. Now, do you receive inbound to Springdale, Arkansas, any materials or supplies used in the canned goods manufacture?

A. In the past operation we have received the inbound shipments. As Mr. Turnbow testified earlier, most of the materials that we use in packing the merchandise that we have been selling Steele Canning Company have been furnished to us by Steele Canning Company.

Q. With respect to the canned goods products that you have been selling to others, how have you received your materials?

A. We have received those in various ways. We have bought part of them from other canners; we have bought part of them locally. The quantity involved has not been large.

Q. Now, what are the materials and supplies which are used in the manufacture of these canned goods?



A. The metal cans, fiber cases, salt, sugar, labels, kitchenware, caustic soda, those are it.

Q. Turning your attention for the moment to the labels, does your company label products under a Cain Canning Company label?

A. Yes, sir, we do.

Q. What proportion of your total production would be labeled under the Cain Canning Company?

A. I would say not over 5 per cent would be under the label.

Q. How is the other 95 per cent of your production labeled?

A. The biggest part of it is labeled, then it is shipped. It is shipped under buyer's label. Practically all of it is [fol. 267] shipped by the customers' labels. And Steele Company labels are in there since they are a customer.

Q. Do you support the application of E. L. Reddish—strike that.

Do you receive any fresh vegetables which you can from points other than Arkansas?

A. Yes, we do. We receive practically all of the vegetables that we can from within a radius of 100 miles of Springdale, which would include a small part of Missouri as well as part of Oklahoma.

Q. Now, in the case of that product that is produced relatively close to Springdale, Arkansas, how is that transported?

A. We buy it and it is delivered by airplane.

Q. Is that delivered by farm truck or by exempt commodity carrier?

A. The big majority is delivered by the growers' own trucks.

Q. Now, have you in the past received vegetables from different sources or—

A. We receive sweet potatoes from Louisiana.

Q. Is that the only point from which you receive sweet potatoes?

A. We have received a few from Mississippi, I believe it is.

Q. How are those sweet potatoes transported from

Louisiana and Mississippi to your plant? Are they transported by truck?

A. They are transported by truck.

Q. Do you arrange that transportation?

A. As a rule, we do not.

[fol. 268] Q. Is the transportation arranged through brokers?

A. It is arranged through brokers. In other words, we buy these items, the biggest part of them, through this broker delivered to our plant.

Q. Do you support the application of E. L. Reddish to furnish materials and supplies to your plant at Springdale, Arkansas?

A. Yes, I do. Well, in the first place, I feel that unless E. L. Reddish can have a back haul of some kind that he cannot afford to operate and give us the outbound service that we feel that we have to have to stay in business. And in the second place, there are times when we need service that we would not be able to get those by common carrier. In other words, there are sizes of cans which we use which are not made at Springdale, and our storage facilities for cans and boxes is limited to a very short supply. In our production we have to keep these supplies all the time and we have to have them. We can do that with a private carrier where we can't ship these shipments far enough ahead.

Q. In the past have these inbound shipments of cans and boxes been scheduled with the Steele Canning Company with your products that they are purchasing outbound?

A. That is right.

Q. Now, tell me, do you use the same tin cans for all the different vegetables or is there a difference in the tin cans?

A. There is a difference in the tin cans. We have certain [fol. 269] cans that we use on different vegetables, different cans for beans and spinach.

Q. Why is that, do you know?

A. Because of the tinplate on the cans. They have a different tinplate on these different cans and they make these cans for specific products.

Q. So if you had tin cans available for beans and you were

packing spinach, you wouldn't be able to put the spinach in those cans?

A. That is right.

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

By Mr. Layne:

Q. Mr. De Wese, do you understand that the application of Mr. Reddish here in this hearing seeks authority to serve your company as one of the three named shippers?

A. I do understand that.

Q. If this application is granted you are prepared to enter into a continuing contract for service with E. L. Reddish to the extent that it may be permitted by the Commission?

A. Yes, we are.

Q. You have not been, your company has not been using the service of E. L. Reddish?

A. No, sir, we have not.

Q. You have not, therefore, entered into any contract, [fol. 270] have you? Have you entered into a contract as yet?

A. No, sir, we have not.

Q. Are you familiar with Mr. Reddish's equipment?

A. We are familiar with the equipment because we have been loading merchandise, we have been selling to Steele Canning Company in that equipment.

Q. In your judgment and opinion is Mr. Reddish's service satisfactory for your company?

A. We feel Mr. Reddish can give us the service that we need, and his equipment is satisfactory.

Mr. Layne: I think that is all I have.

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

Cross examination.

By Mr. Jones:

Q. Concerning approximately 15 per cent of your production, which you have been selling in the past to canners other than Steele Canning Company, could you state in what states those canneries are located?

A. They are located in Arkansas and Oklahoma.

Q. And I believe you stated they will furnish the transportation?

A. That is right.

Q. So that what we are talking about here is the 10 per cent spread between the 85 and the 75 per cent difference in [fol. 271] what Steele has been buying, plus what you may increase that amount in the future. Do you desire to have more security?

A. That is right.

Q. Now, I believe you stated that the few sales that you have been able to make so far have been generally in Kansas City, St. Louis, and Chicago, where you have sold primarily truckloads or loads pooled between two or three stops, is that correct?

A. That is right.

Q. Are you making any effort to sell any amount in the State of Colorado?

A. No, sir.

Q. You have no solicitors in that state?

A. No, sir.

Q. New Mexico?

A. No, sir.

Q. Kansas?

A. You asked if we have solicitors. All of our merchandise is sold through brokers and since we have been selling to other canners we do not have an extensive sales organization set up. If we were able to sell these customers these smaller quantities we would be able to build up a sales organization and solicit business.

Q. I am asking you, now, sir, do you have any such solicitation in the State of North Dakota?

[fol. 272] A. No, sir.

Q. South Dakota?

A. No, sir.

Q. Minnesota?

A. Yes, sir.

Q. What solicitation do you have in Minnesota?

A. What do you mean?

Q. I understood you to say you do not have any solicitation in the other states but you do have in Minnesota. Did I understand you correctly?

A. We have—would you mind clarifying that a little bit?

Q. Is your company at present engaged in soliciting business for the sale of your products in the State of Minnesota?

A. All right.

Q. To what extent?

A. Minneapolis.

Q. And in what manner?

A. In what manner?

Q. In what manner are you soliciting business in Minneapolis?

A. We have a broker in Minneapolis.

Q. Have you made any sales as yet?

A. No, sir.

Q. As to the merchandise we are talking about?

A. That is right.

Q. Have you made any investigation whatsoever as to [fol. 273] the service which is available to the States of Colorado, New Mexico, Kansas, North and South Dakota, or Minnesota?

A. No, sir, we have not.

Q. You have no idea what service might be available to you, is that right?

A. No, sir.

Q. If you presently have a carrier available to Colorado, Kansas, New Mexico, who can furnish you the same type of service proposed by the applicant, would you have any objection?

A. No, sir.

Q. And if the same is true in the Dakotas and Minnesota, with the difference that it would involve an interchange be-

tween two carriers and trailer loads, would you have any objection?

A. No, sir. What we would like to do is to ship everything that we possibly can by common carrier.

Q. Motor common carrier?

A. Yes.

Q. And if that service is available to you would you use it?

A. If we can get the same service as we can get from Reddish we would be glad to use it.

Mr. Jones: No further cross-examination. Thank you.

Cross examination.

By Mr. Ashton:

Q. Mr. De Wese, you are in the business for furnishing canned goods to other canners, is that right?

A. That is right.

[fol. 274] Q. And upon finding that you had an excess production caused by the labor difficulty of the Steele Canning Company, the company was more or less forced to sell to individual customers, is that correct?

A. That is right, that is correct.

Q. Do you also say, I believe you also said that you are going to continue in an effort to get more private customers?

A. We would like to get some private business so that we won't be dependent upon moving a percentage of our merchandise to one customer.

Q. But you haven't built that business up?

A. No, sir, we have not. And I do not believe that we can ever build it up unless we can make small deliveries.

Q. So you have no present need for this type of service, do you?

A. Well, we feel that we do have a very urgent need for it at the present because, as I stated earlier, we have an inventory which is the largest we have ever had and it is a matter of getting—

Q. Did you ever have any orders to private customers that you were unable to fill because of the lack of transportation?



A. Yes, sir.

Q. Where did you have one of these?

A. Nylon, Illinois.

Q. And there is no service available?

[fol. 275] A. Fort Wayne, Indiana. There was no service available that would enable us to ship a small order of that size at a competitive price.

Q. Those are the only two points?

A. No. We have had Bloomington, Indiana, Hutchinson, Kansas, and Liberal, Kansas. Those are a few of the points where we had to turn down business because we couldn't make delivery.

Q. In those cases you had firm orders from the customers?

A. We were offered orders if we could make delivery.

Q. What efforts did you make to determine what service was available to these points that you just mentioned?

A. We checked with the local truck line, Jones Truck Line, in regard to service they can give us.

Q. Did you check with the Frisco Transportation?

A. No, sir, we did not.

Q. Did you check with Levin Truck Line?

A. No, sir.

Q. Did you check with any other truck lines?

A. No, sir.

Q. You found out that Jones could not handle it?

A. Frankly, it looked pretty hopeless to us because we were not able to get anything about like sufficient weight for a truckload.

Q. Well, do you know whether or not Mr. Reddish would handle less than a truckload shipment to that point?

[fol. 276] A. If it would be the only shipment we had to that point it would be combined to—

Q. At the same possibility as the factual situation that existed as a common carrier?

A. Actually, it is. But at the same time, as I stated, we didn't feel we would be able to go out and solicit orders to meet this truckload, not having any way of making delivery other than l. t. l. freight.

Q. What percentage of your total production since the Steele Company strike has been sold to private customers?

A. What percentage?

Q. Of your production, yes, not your inventory, but your production.

A. I would say from 2 to 5 per cent. I would say not over 2 per cent.

Q. What does your inbound volume per year amount to in truckloads, I am speaking now of other than exempt commodities, do you know?

A. No, sir, I do not.

Q. Do you have any idea?

A. The only guess would be on the size of the pack, 100,000 cases.

Q. You mentioned about the inbound truckloads, the cans, cardboard containers, and the other items that you mentioned as inbound items. Now, do you mean on that the [fol. 277] products that the Cain Canning Company is selling for your total production?

A. We are selling other than to Steele.

Q. I understand that. I want to know if your plant there at Springdale, Arkansas, has a certain amount of incoming commodities now other than exempt commodities. You have cans, packing cases, and so on. Now, what does that amount to per year in truckloads?

A. I don't know. I don't know.

Q. Other than what you get from the Steele Canning Company.

A. Other than what we get from the Steele Canning Company, it would be a very small movement because we buy most of the items that we don't get from the Steele Canning Company locally.

Q. You mentioned in your direct examination something about the need for a carrier such as Mr. Reddish to have a balanced movement, which was why you were supporting this inbound commodity portion of his application.

A. That is right.

Q. Your activities wouldn't do much to balance it then, would they?

A. Well, actually, on our merchandise we would probably be able to use back hauls on most of the merchandise of theirs that we ship.

Q. Although you have a very, very small amount?

A. We are hoping to have a larger amount. We have had a very small amount outbound.

[fol. 278] Q. What portion of the 85 per cent of your products that you sold to Steele Canning Company did you deliver to them at Springdale, Arkansas?

A. I believe that all of the products that we sold to Steele Canning Company was delivered to them at our plant.

Q. And they picked it up?

A. That is right, they picked it up.

Q. Do you know what proportion of it they took at Springdale for use at their Springdale facilities?

A. No, sir, I don't.

Q. Do you know if any of it went to Lowell or to Oklahoma or to Fort Smith?

A. No, sir.

Q. You don't know if any of it did?

A. No, sir.

Q. You don't know anything about the service performed by the Frisco Transportation Company?

A. No, sir.

Mr. Ashton: That's all I have.

Cross examination.

By Mr. Matthews:

Q. Previously on this record this morning Mr. Turnbow testified that the common carrier l. t. l. rates were prohibitive insofar as these shipments were concerned. Is that true with your shipments, too?

A. Yes, sir.

[fol. 279] Q. So that you agree with his position as far as the prohibitive nature of the l. t. l. rates?

A. That is right.

Q. And I presume that is actually what you are referring to when you testified on direct examination that you had no way of transporting your l. t. l. shipments?

A. That is right.

Mr. Matthews: That is all I have.

**Cross examination.**

**By Mr. Gunn :**

**Q. Would you go into direct competition with Steele Canning Company?**

**A. Yes, sir.**

**Q. Are you familiar with any of the services of the Elliot Truck Line?**

**A. No, sir, I am not.**

**Q. As to your proposed increase of business, you have no idea how much your business will increase, do you?**

**A. No, sir.**

**Q. It is speculative on your part.**

**A. We feel that we could increase it, yes, sir.**

**Q. But you don't know.**

**A. No, sir.**

**Mr. Gunn : I have no further questions.**

**Cross examination.**

**By Mr. Darden :**

**Q. Mr. De Wese, are you familiar with the operating [fol. 280] rights of the Arkansas system?**

**A. To a certain extent, yes, sir.**

**Q. Have you used that?**

**A. No, sir, we have not.**

**Q. You have not had occasion to use it?**

**A. No, sir.**

**Q. Now, you said that about 85 per cent of your products went to Steele Canning Company, is that right?**

**A. That is correct.**

**Q. Steele Canning Company has been nothing more to you than a broker and someone furnishing transportation?**

**A. Steele Canning Company has been our best customer.**

**Q. Your best customer?**

**A. That is right. In other words, as long as we are in a position to pack this merchandise and sell it to Steele Canning Company we didn't see that we needed to go out and try to sell the merchandise outside of the customers that we had there.**

Q. You sell your merchandise to them at the same price you would sell to other customers?

A. We sell our merchandise to them at market price.

Q. Market price. And all they were selling you was transportation, is that right?

A. All we were selling them was our merchandise. The transportation, no, sir, the transportation doesn't enter into [fol. 281] it. As far as we were concerned we were packing our merchandise and selling to Steele Canning Company. We were letting them worry about the transportation.

Q. How did you get your merchandise as far as Mr. Reddish's emergency authority?

A. I testified earlier that we didn't ship merchandise, that practically everything that we sold was picked up by our customers' trucks.

Q. Now, where is the Steele plant located with reference to your company?

A. Steele Canning Company plant is at Lowell, Arkansas, which is approximately five miles north of Springdale. Their plant is in Springdale on Highway 71, north.

Q. Steele has a plant near you?

A. No, sir.

Q. Did they formerly have one there?

A. No, sir.

Q. You are on Highway 71 north out of Springdale?

A. That is right.

Q. There is some sign on the building there that shows it is Cain Canning Company.

A. There is a sign there for advertising purposes only.

Q. It is not their building?

A. No, sir.

Q. That is your building?

[fol. 282] A. That is Cain Canning Company building.

Q. How long have you been operating as Cain Canning Company?

A. Four or five years.

Q. On shipments other than merchandise that you sell to Steele, you stated there were some small amounts that you did sell other than to Steele, where are most of them destined?

A. You mean since Steele has had this labor difficulty? The shipments that we have labeled since then, they are destined to the points that I named earlier, Chicago, Kansas City, and St. Louis.

Q. Now, you say that you think it is necessary that Mr. Reddish have a backhaul. Where do you get your sugar, for instance?

A. We get our sugar at Louisiana.

Q. Now, most of your shipments are going to Chicago, Kansas City, and points north. How is he going to backhaul sugar?

A. Just because their shipments are north there is no reason—

Q. He wouldn't be able to backhaul the sugar from Louisiana for you, is that right?

A. That is right.

Q. Have you shipped any quantity of merchandise by Mr. Reddish since the strike?

A. No, sir, we have not shipped any.

Q. Nothing by him?

A. No, sir.

[fol. 283] Q. Most of your sales have been through Steele itself, is that right?

A. That is right.

Q. Have you made any other shipments other than what goes to Steele?

Exam. Hanback: That is repetitions.

Mr. Durden: Pardon me. I am trying to arrive at something.

Exam. Hanback: Proceed.

By Mr. Durden:

Q. How were those shipments made?

A. They were made by Jones Truck Line.

Q. Did you ever use Arkansas Freight System?

A. No, sir.

Q. Campbell 66?

A. No, sir.

Q. Have you ever used any other carrier?

A. No, sir.

Mr. Durden: That is all.



**Cross examination.**

**By Mr. Eyster:**

**Q.** Mr. De Wese, these brokers, you do not have a sales department as such, I believe you stated you use brokers to make your sales.

**A.** That is right.

**Q.** Taking the State of Illinois, where would these brokers be located?

**A.** Chicago.

[fol. 284] **Q.** In what radius besides Chicago, if you think you know?

**A.** He sells in Illinois and part of Indiana.

**Q.** How far down in Illinois, do you know?

**A.** Milan.

**Q.** I am not familiar with Milan. How far down the state from Chicago?

**A.** It is over on the west side of the state.

**Q.** You know, of course, that the application has been amended to exclude Chicago as a destination point?

**A.** Yes, sir.

**Q.** Would you say that your broker would have enough sales in the State of Illinois and the State of Indiana outside of Chicago on which you could make up a truckload?

**A.** That would be speculative because we haven't tried.

**Q.** And you know, of course, both the other points you named, St. Louis and Kansas City, have been excluded.

**A.** Yes, sir.

**Mr. Eyster:** No other questions.

**Cross examination.**

**By Mr. Bazelon:**

**Q.** Mr. Jones asked you earlier whether or not you were soliciting in other states. I would like to ask along that line on different states, take for example, in the State of Arizona.

**A.** May I say in answer to your question, as I have testified, we have been making all of our sales to other canners [fol. 285] until this labor trouble developed since that time,

we have not tried to any great extent to develop a sales organization because we knew that we were going to be very limited on the shipments that we can make in full truckloads and we didn't feel like we could go into a new territory.

Q. Would Arizona be a new territory?

A. It would be.

Q. How about Nebraska?

A. It would be new.

Q. How about Iowa?

A. Practically any territory that you care to name would be a new territory.

Q. Iowa would be?

A. Yes, sir.

Q. And so would Wisconsin?

A. Yes, sir.

Q. I don't know if I asked you about California.

A. Yes, sir.

Q. And those new territories that you refer to are ones that you have not as yet done anything with solicitation-wise?

A. That is right.

Q. And that would be both inbound as well as outbound?

A. That is right.

Q. Does your company have a traffic department?

A. No, sir, we do not.

[fol. 286] Q. You are the traffic man, so to speak?

A. That is right.

Q. You mentioned that the Cain Canning Company has been in business for about five years. Have you been President of the company for that long?

A. Yes, sir.

Q. Prior to that were you employed by Steele Canning Company?

A. Yes, sir, I was.

Q. And how long had you been with Steele Canning Company?

A. For twelve years.

Q. And five years ago you came over and became President of the company?

A. That is right.

**Q.** Do you hold any interest in the Steele Canning Company?

**A.** I do not hold an interest, no, sir.

**Q.** Well, does Cain Canning Company, or anyone connected with Cain Canning Company, or any stockholder of Cain Canning Company have any interest whatsoever in the Steele Company?

**A.** Yes, sir, to this extent, Mr. Steele has some stock in Cain Canning Company. No one who is connected with Cain Canning Company as such has any part of any stock of Steele Canning Company.

**Q.** I see. It is Steele Canning Company that owns the interest in Cain.

**A.** That is right.

[fol. 287] **Q.** And is Mr. Steele the principal stockholder?

**A.** No, sir.

**Mr. Layne:** I will object to that. He is not entitled to go into that farther when it may be proved by the same people, **Mr. Examiner.**

**Exam. Hanback:** Objection overruled.

Do you understand the question?

**The Witness:** Yes.

**A.** No, sir, I do not know. I do know that it is not controlled but as to the actual interest, I do not know.

**By Mr. Bazelon:**

**Q.** May I ask you this, do you have the controlling interest?

**A.** No, sir.

**Q.** There is someone else in connection with you and Mr. Steele that has the controlling interest or—

**Mr. Layne:** I object to that. I don't think that is relevant, **Mr. Examiner.** He has gone far enough.

**Mr. Bazelon:** I think it is relevant. I am just trying to find out if perhaps maybe we don't have really one shipper here instead of two or three.

**Mr. Layne:** We don't have a problem as far as that is concerned. What bearing does that have on the Commission, **Mr. Examiner?** He may not have an interest in this

kind of information, but this is not a company like a carrier that has to report all of its details to the public. It is [fol. 288] a highly competitive industry.

**Exam. Hanback:** Objection overruled.

You may answer.

**By Mr. Bazelon:**

**Q.** Are you and Mr. Steele the stockholders?

**A.** No, sir, there are several stockholders in Cain Canning Company.

**Q.** Do any of the stockholders in Cain Company have interests in the Steele Canning Company?

**A.** No, sir.

**Q.** How long has it been that your company has sold approximately 85 per cent of its production to the Steele Canning Company?

[fol. 289] **A.** I would say in the last 4 years.

**Q.** Isn't it true, sir, that if the Steele Canning Company again desires to buy, instead of 75 per cent of your production, 85 per cent, that you would sell it to him?

**A.** We would sell all that they want to buy as long as we have the merchandise for sale; however, if we can develop additional sales, we can produce more merchandise than we are now producing, we are not producing to capacity.

**Q.** But in answer to my question, so to speak, Steele Canning Company gets first call?

**A.** Any customers that want to buy merchandise from us as long as we have merchandise available is going to be able to buy merchandise from us. If Steele Canning Company wants more merchandise, we will be glad to sell it to them.

**Q.** Sir, why was your company picketed, do you know?

**A.** I think primarily the sign on the building that Mr. Durden referred to earlier.

**Q.** Why do you say that?

**A.** He asked me why I thought we were picketed.

**Q.** What makes you think so?

**Mr. Layne:** Objection.

**Exam. Hanback:** Objection sustained.

Mr. Jones: You mean you can't put speculation in a hearing any more?

Exam. Hanback: No.

[fol. 290] By Mr. Jones:

Q. Of the 10 or 15 per cent that you heretofore have sold to Steele Canning Company, which you no longer sell to them, how much of that is truckload traffic?

A. I don't follow your question on that. Actually, we are not selling it now, it is taken up in our warehouse, that's our trouble.

Q. Well, you made some sales to Kansas City, St. Louis, and Chicago, and those were truckloads?

A. If they were not truckloads we didn't make them.

Q. Then what percentage of your 10 or 15 per cent is covered by these shipments to Kansas City?

A. Possibly 2 or 3 per cent.

Q. Doesn't Steele Canning Company presently have the facilities in which to move your products?

A. No, sir, they do not.

Mr. Jones: That's all.

Cross examination.

By Mr. Ryan:

Q. Has your company in the past purchased canned goods from any source?

Exam. Hanback: The applicant is seeking authority to haul inbound shipments of the canned goods.

The Witness: No, sir, we have not.

By Mr. Ryan:

Q. Do you have reason to suppose that you will in the future purchase canned goods from other sources?

[fol. 291] A. If we are able to develop customers and they depend on us for merchandise, I am sure that we will because there will be times we won't have enough merchandise on hand to take care of their requirements.

Mr. Ryan: I have no further questions.

Mr. Hayes: No questions.

Exam. Hanback: Any redirect?

Mr. Layne: No.

Exam. Hanback: You are excused.

(Witness excused.)

Exam. Hanback: We will go to lunch and report back at 1:45.

(Whereupon, a recess was taken until 1:45 p.m. of the same day.)

[fol. 292]

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AFTERNOON SESSION

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Exam. Hanback: On the record.

Mr. Layne: I would like to call Mr. Hunter.

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M. M. HUNTER was sworn and testified as follows:

Direct examination.

Exam. Hanback: Let's proceed.

Would you please state your name and business affiliation for the record.

The Witness: M. M. Hunter, General Manager of Keystone Packing Company, of Fort Smith, Arkansas.

By Mr. Layne: •

Q. Mr. Hunter, does the Keystone Packing Company in Fort Smith, Arkansas, operate a plant at Fort Smith?

A. Yes.

Q. Do you have any warehouses?

A. We have warehouses that we maintain at the plant site.

Q. Do you have warehouses other than at Fort Smith?

A. We do not.

Q. Where is your plant located?

A. It is 721 South Fourth.



Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

By Mr. Layne:

Q. Well, what does it produce at this plant at Fort Smith, Arkansas?

[fol. 293] A. Well, we pack green beans, spinach, turnip greens, mustard greens, potatoes, collard greens and Irish potatoes.

Q. Are these packed in tin cans?

A. They are packed in tin cans.

Q. Can you give us any estimate of the volume of your production for any particular period, a month or year?

A. Well, of course, it's like some of the other, temporary, it depends on crop conditions, of course, we are solely dependent upon them. I would say that within a normal year between four and five hundred thousand cases.

Q. And when you use "cases," how many cans are you referring to?

A. Well, of course, it depends. Different can sizes, of course, the different number in the cases. Normally, we consider 24 cans to the case, that's normally speaking.

Q. Do you also consider that a case is approximately 24 pounds?

A. Well, a case is approximately 30's is 30 pounds; and 21½'s, of course, a larger can, that's 50 pounds; and then No. 10 case, which contains only six cans, that means it's all the way from 45 to 50 pounds.

Q. And roughly how many cases make a truckload?

A. About a thousand cases.

Q. Now, to what companies or to what purchasers do you sell your production?

A. Well, of course, we sell Steele Canning Company more than any other outlet that we have. Prior to the labor difficulties that Steele is having, we sold them about 75 per cent of our packing. The other 25 per cent was, of course, direct to customers. It just depends if they are short on some item they may call and ask us if we have available, but that is very much in minority. I would say

that we sell very little to other canners except to Steele Canning Company.

Q. Now, in the sales that you have made in the past to Steele Canning Company, how do you sell that or where does Steele get the merchandise from?

A. At Fort Smith.

Q. And who arranges or what company arranges for the transportation of the commodities you sell to Steele Canning Company?

A. Well, usually they make all the arrangements with the exception of something that we may sell them delivered on our own trucks to Springdale.

Q. All right. Well, so far as transportation from—to Fort Smith on commodities that you sell to Steele Canning Company, who makes the arrangements for transportation?

A. Steele Canning Company.

Q. Now, in the past or at least prior to June 1958, do you know of your own knowledge as to the shipments that were made from your plant to Steele Canning Company, what carriers or what equipment picked it up in '58, June '58, prior to June of '58?

A. Well, now, let me see if I have your question. Well, give it to me again.

[fol. 295] Q. All right. Prior to June '58, what equipment or what carriers picked up for Steele at your plant at Fort Smith, Arkansas?

A. Steele Canning Company.

Q. And that is their own equipment?

A. Yes.

Q. By the way, is your plant located on a rail siding?

A. Yes, Kansas City Southern.

Q. With respect to the commodities that you had prior to June 1958, that you sold direct to customers and not the Steele Canning Company, does your company have a sales organization to sell out?

A. We do.

Q. Well, what territories do you sell your products other than these that are sold to Steele Canning Company?

A. Well, we sell, of course, in several states. Do you want the states?

Q. Yes.

A. Well, prior to this we sold in Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, New York, Virginia, North and South Carolina, Florida, Georgia, Alabama, Louisiana, Mississippi, Texas, Oklahoma, Kansas, well, that's all I can think of right now.

Q. Well, did you sell to one or more points in each of the states, or do you have more than one point?

[fol. 296] A. Well, we have more than one point.

Q. Well, who are your customers, what type of customers do you have located in the various states?

A. Well, we have institutional people who handle nearly exclusively to larger cans, which we classify as a No. 10 can; and then, of course, we have for chef size, the smaller size cans we sell to chains; and, of course, we do sell some to wholesale grocers.

Q. Now, can you look at what has been identified here as Exhibit No. 3, and with respect to the facts that you have mentioned, can you tell me whether you sell or do not sell to the points indicated on Exhibit No. 3?

A. You are speaking of what we have sold ourselves, direct sales?

Q. That's right.

A. We haven't sold anything into Arizona, California, Colorado, just on this one exhibit.

Q. All the pages of it?

A. Oh. Iowa, Maryland, Minnesota, Nebraska, New Mexico, South Dakota, and Wisconsin, we have sold to—I am saying that those are the states that we haven't sold.

Q. Have you sold in all the other states that are referred to on Exhibit No. 3?

A. Yes, sir.

Q. How about the points that are listed under those par-[fol. 297] ticular states? Now, I do not ask you to reach each and every point, can you tell me whether you have customers at those points?

A. Do you mean the number in each state?

Q. Well, the particular points.

A. Well, yes, I can tell you. Birmingham is one of our shipping points, Birmingham, Alabama; Montgomery, Alabama. You don't include Arkansas here?

Q. No, no.

A. Atlanta, Georgia, Augusta, Savannah; Jacksonville, and Miami, Florida, however. Miami isn't on here, but we do ship into Miami; and Illinois, I guess that would be next, to Carbondale, Kankakee, Peoria, Murphysboro, Chicago, Springfield; Indiana would be Bloomington, Indianapolis, Terre Haute, Vincennes; Iowa, we don't sell; Kansas would be Wichita, we don't to Wichita, Topeka; Kentucky, we go to Lexington, Paducah, Russell, Kentucky; Louisiana, New Orleans; Michigan, Detroit; Jackson, Mississippi; Missouri, Kansas City, Springfield, St. Louis; North Carolina is Charlotte, Raleigh; Ohio is Bellefontaine, Cincinnati, Cleveland, Columbus, Dayton, Toledo; Oklahoma—New Jersey, Newark, New Jersey.

Exam. Hanback: Is New York on here?

The Witness: I don't believe New York is on here.

A. (Continuing) Now, we are in Ohio—Tulsa and Oklahoma City; Pennsylvania is Pittsburgh; South Carolina is Greenwood; Tennessee, Memphis, Nashville; Texas is Dallas; and Virginia is Richmond; and we go into West Virginia [fol. 298] ginia, but I don't see any point on here that I—let's see—

Q. Where do you go into West Virginia?

A. Well, I am trying to—we have one customer in West Virginia just south of Pittsburgh, and just offhand I can't recall the name of the—it's a town of about 100 miles south of Pittsburgh, I just don't remember the name of the town. Perhaps it may be on here, but we have one point in West Virginia that we ship canned goods.

Q. Is that completed?

A. That's complete.

Q. Now, Mr. Hunter, how have you arranged for the transportation of the products to these points that are not purchased by Steele Canning Company?

A. Well, of course, we have, as in the past, we have used common carrier, both truck and rail, but since Steele has had this labor difficulty, of course, which had affected our sales to Steele, in order to pick up this amount of canned goods and in order to continue with our volume in our shipping volume, well, we have purchased two trucks of our own.

Q. When did you purchase these two trucks?

A. Well, that's since Steele's labor difficulty, we purchased one in July, I believe, one in June.

Q. Of 1958?

A. 1958.

[fol. 299] Q. And have you been making the shipments direct to these points on these trucks?

A. Yes.

Q. Did you own any or did Keystone Packing Company own and operate any vehicle prior to June of 1958?

A. No—well, the only truck we had was the trucks that we used in the State of Arkansas, no interstate business.

Q. And prior to June of 1958, there were no interstate vehicles?

A. No, sir.

Q. And since June, or June and July, you have operated units?

A. Yes.

Q. And did you buy those units new?

A. Yes, we did.

Q. Well, why did you buy those units?

A. Well, the main reason is because it's the nature of our sales—there is a lot of business that we could pick up provided that we had trucking equipment in order to make deliveries and, in that I mean that the nature of our sales or a lot of our sales, they give us specific dates to arrive at destination. Well, in many instances, if we didn't have our own equipment in order to make those deliveries, it would be impossible to fulfill our agreement with them and the result is that we would lose sales.

Q. Had you used common carrier to deliver prior to 1958?

A. Yes, sir.

[fol. 300] Q. What common carrier were you using?

A. Well, of course, we used the railroad, we used the Kansas City Southern tracks, however, we have used Frisco and Missouri Pacific as well, and in the way of trucks we have used Arkansas Best, England Brothers, Jones Truck Line, and Perky. Now, I don't recall if we have used Campbell 66, I don't think so, it may have been some inbound, but outbound you are talking about?

**Q.** That's right. What proportion—let's see, now, prior to June of 1958, you say that 75 per cent of your production went to Steele?

**A.** That's right.

**Q.** Now, remaining amount—strike that. Was all of that 75 per cent picked up by Steele or the transportation which was arranged by Steele?

**A.** Yes, it was all arranged by Steele.

**Q.** And as to that, do you know of your own knowledge whether it went by motor common carrier or by rail common carrier?

**A.** Well, it went both ways, by motor and rail.

**Q.** Now, as to the—or did it also go by Steele's own truck?

**A.** Yes.

**Q.** Now, with respect to the balance of it, how much did you ship direct to customers by rail, do you know?

**A.** Well, you mean now?

**Q.** Of the 25 per cent.

**A.** Twenty-five per cent by rail, I would say 5 per cent.

[fol. 301] **Q.** And the balance of it, did that all move by motor common carrier?

**A.** Yes.

**Q.** After you purchased the trucks did—after June 1958, has your sales to Steele fallen off?

**A.** Yes, it had, but I would say we are selling them now somewhere between 60 and 65 per cent where we sold them 75 per cent prior.

**Q.** And these two vehicles that you have purchased, what are they transporting, the amount that you had previously been selling to Steele?

**A.** Well, we have since we had these new trucks, that has given us an opportunity to go out and get new business. We feel that by buying the two new trucks that we have offset our loss from Steele, but we haven't really pursued sales into territories that we feel that we couldn't get business simply that we don't have the equipment in order to make deliveries.

**Q.** Actually, has the use of this private carrier equipment expanded your volume?

**A.** Yes, yes, it has.



**Q.** Well, now, are you here supporting the application of E. L. Reddish?

**A.** Yes, I am.

**Q.** Well, do you know, recognize, E. L. Reddish as an applicant here to serve the territory from Arkansas to numerous states?

[fol. 302] **A.** Yes.

**Q.** Well, if E. L. Reddish is granted the authority to operate as a common carrier, what's your plan with respect to this private carriage operation?

**A.** Well, as far as we are concerned, we are not interested in going into the trucking business, that in the first place, that isn't our business. We think it's a separate business, and if we can make arrangements to where we can go out and expand our sales into territories with an arrangement like with Mr. E. L. Reddish, then as far as we are concerned we will get out of the trucking business. We don't want any part of it, in fact, we have stayed out of it all these years, and so I will say we are not interested in going into the trucking business.

**Q.** Prior to your buying these two pieces of equipment, did you have any discussions with motor common carriers with respect to the service at the time of the purchase of this equipment?

**A.** You mean if they could handle the sales?

**Q.** That's right.

**A.** Yes, I did.

**Q.** What motor common carriers have you spoken to?

**A.** Well, I talked to Jones Truck Line on certain shipments going out of Fort Smith, also Arkansas Best, with Mercury, I think those are the three, about the service that they could render to certain points.

[fol. 303] **Q.** Do you have any policy with respect to using common carrier, motor common carriers, do you use them?

**A.** We do use them; yes, we use them regularly.

**Q.** Do you have your own sales force?

**A.** Yes, sir.

**Q.** Do you have a sales force located in each of the states in which you referred to as having customers?

**A.** Are you speaking of brokers?



Q. Yes.

A. Not altogether we don't, much of the sales we handle direct. We do have some brokers, but we didn't have brokers in all of the states that we are selling. Many of those sales are handled direct by the buying.

Q. In what size shipments do you use your own private carriage operation at the present time, what is the size of the shipment?

A. Well, most of them are straight truckloads. Occasionally, we have as many as—I think probably the most, about four drops. Normally, the way we are trying to handle it, is to adjust these trucks, well, I would say all the way from two to two drops.

Q. Do your customers specify to you a time of arrival?

A. They definitely do on all the shipments that we get.

Q. What is the time of arrival specified, what are the times of arrival specified to you?

A. Well, I can give you an illustration of just this past [fol. 304] week. We had three different customers that had specified the exact date even to the point of the hour of the day that they wanted our trucks to arrive and the reason that they gave us that, sometimes it's because they are running a special and many times these specials are actually advertised before the order is placed with us, so they have a deadline to meet. Then other instances is because they all indicate time to other suppliers on various dates, either morning or afternoon, they don't usually pin it down to any certain hour, however, we have actually had that where we had to get to a destination or to a point of unloading at a certain hour, in all indicating us certain hours of the day and day of the week of unloading because of the nature of their business. Whether it was because they had other trucks coming or whether it was something contrary to their operation, of course, they don't explain that. They tell us when they want it there.

Q. Is it necessary to give this kind of service to your customers?

A. Very definitely, because they can get it from our competitors.

Q. If you don't give the type of service, what happens?

A. We don't get the business.

Q. Were you in the hearing room when Mr. Turnbow identified a number of competitors in the canning business?

A. Yes, sir.

Q. Is that generally your competitors?

[fol. 305] A. Yes, sir, and more.

Q. Now, can you tell me whether in the event the application of Reddish is not granted for authority to transport commodities outbound whether that will have effect upon your operation, upon your policies and plans?

A. Well, it will have a direct effect because we feel that it will be necessary not only to expand our sales as much as we have already since it happened, but we will have to continue. It means that if we can't make arrangements with Mr. Reddish that we will have to buy more equipment in order to expand those things.

Q. Now, do you have peak seasons in your packing?

A. Yes, sir.

Q. Does the volume of your packing or the grade at which you are running the packing have anything to do with the transportation requirement?

A. Not altogether.

Q. Do you have warehouse facilities to warehouse the packing?

A. No, sir, we do not. In fact, particularly, during our packing season, it is necessary for us to move a certain amount of merchandise in order to be able to pack and have a place to store it. We don't have facilities in order to hold an entire season's pack.

Q. Now, turning for the moment to the commodities and supplies that you receive with which you operate your [fol. 306] plant, do you receive inbound at Fort Smith, Arkansas, supplies and materials used in canning and packing these vegetables?

A. Yes, sir.

Q. What supplies do you receive inbound?

A. Cans, boxes, salt, caustic soda, labels, those are the principal ones.

Q. All right, now, in the past or are you now receiving some of those commodities from Steele Can Company?

A. No, we are not receiving any from them now.

Q. Have you been in the past?

A. Yes, we have, that is, we had an arrangement with them that they furnish the supplies on the amount of whatever can goods that we are selling to them.

Exam. Hanback: Who is "them"?

The Witness: Steele Canning Company.

By Mr. Layne:

Q. Did Steele Canning Company then supply to you the raw materials and the cans on the pack on the vegetables canned for them and sold to them?

A. Now, you are speaking of raw materials, you are talking about supplies?

Q. Yes.

A. Yes, they did.

Q. What did that include, what commodities, specifically, did Steele supply to Keystone Packing?

A. Cans, boxes, labels, caustic soda, salts.

[fol. 307] Q. Now, what was the situation with respect to the fresh vegetables that were canned?

A. Well, of course, we buy all of our fresh vegetables or most of them directly from farmers and, of course, they have their own method of transportation, we buy them delivered to the plant.

Q. Do you buy any of your vegetables, such as Irish potatoes or other vegetables, usually directly at the point of production and transport?

A. Yes, yes—well, we don't buy them direct, we buy them through a broker or fresh market supplier and, of course, he arranges all of the transportation, all raw materials are bought f.o.b. our plant. We don't go out and buy anything and haul it in.

Q. Now, that is to say, with respect to vegetables?

A. Yes.

Q. What is the situation with respect to the cans and other supplies, do you buy those f.o.b. your plant?

A. Some of them we do and some we don't.

Q. All right. Now, where have you been receiving your cans?

A. Well, we buy from three different can companies, Continental, and American. American has the plant in Fort Smith, however, we buy very few from them, but we do buy some. We pick those up with our own trucks and since this difficulty with Steele Canning Company, we have [fol. 308] been using our own trucks. We have been hauling cans out of Elwood, and Chicago, Illinois, from Continental and from Heekin Can Company at Norwood, Ohio, which is a suburb of Cincinnati, our boxes would come out of.

Q. And do you also obtain some of the supplies from Heekin, Arkansas?

A. Yes, we do buy supplies from the Heekin Canning Company.

Q. Now, have you transported on these vehicles, these two vehicles that you are now operating, other supplies and materials, such as sugar and salt and caustic soda?

A. Well, we don't buy sugar, but we did have caustic soda and salt, the things that we use in our operation.

Q. Have you transported those on your private vehicles?

A. Just happens that we haven't transported any salt or caustic soda up until now because we are not in the season to use caustic soda and, of course, a truckload of salt will last us for nearly a year.

Q. Well, can you give us some idea of the volume of inbound movement of the various supplies such as cans, boxes, salt, caustic soda, and any other items?

Mr. Bazelon: Is this excluding the Steele's?

Mr. Layne: This is.

The Witness: Where we pick up supplies?

By Mr. Layne:

Q. That's right, how much the volume is and so forth.

A. Since we have had our own operation.

[fol. 309] Q. Yes.

A. All right. We haul from Continental Can Company at Chicago, approximately five truckloads of cans, various sizes; from Elwood, Indiana, Continental Can Company, approximately ten loads of cans; the Heekin Can Company at Norwood, Ohio, approximately, well, I would say between twelve and fifteen truckloads of cans. That's the

only places now in cans because the other cans are local. We bought about—either three or four truckloads of boxes from the Shelby Box Company at Memphis. We haven't brought in any caustic soda or salt, and so forth, because we haven't needed it.

Q. Can you tell us what volume of salt that you would bring in over a period of a year?

A. Well, probably not ever more than two truckloads, probably one truckload.

Q. And caustic soda, what is the volume of that?

A. Well, that depends on the amount of potatoes that we pack, but I would say from two to three truckloads a year.

Mr. Jones: Where?

By Mr. Layne:

Q. Where does the salt originate?

A. Well, the salt movements originate—however, we haven't received any, but I can tell you where they come from.

Q. Where?

A. South of St. Louis or out of a place in Texas, Grand Saline, Texas, that would be the origin of salt and the [fol. 310] caustic soda. I never had occasion to buy any, so I—there are several places you can buy soda, but I haven't made up my mind where you buy it.

Q. Can you buy it?

A. You mean what point?

Q. Yes, sir.

A. I don't even know that.

Q. Now, do you support the application of E. L. Reddish for authority to move your commodities outbound from Fort Smith, Arkansas?

A. Yes, sir.

Q. Why do you support the application of Reddish?

A. We feel that if we had his service that we could explore new territory where we are not getting business now, but in order to do that we know that we are going to have to take a lot of small orders in order to increase our sales; and we feel that he is in a better position to

make deliveries under the conditions which we operate being competitive with other canners' private carrier operation; and we feel that's the only way that we can increase our business in that respect; and if we don't get it, it means if we are going to pursue those points for sales that we will have to buy more equipment to operate ourselves.

Q. Now, so far as the outbound commodities are concerned, have you seen the equipment of E. L. Reddish, has [fol. 311] he picked up at your plant?

A. Yes, sir, he picked up for Steele Canning Company.

Q. Have you seen that equipment?

A. Yes.

Q. Is that equipment satisfactory for the movement of your canned goods?

A. Very satisfactory.

Q. Do you believe that his services would be satisfactory for your company?

A. Yes, I have every reason.

Q. Would you be recommended to enter into a continuing agreement with E. L. Reddish for him to perform services for the Keystone Packing Company as a contract carrier by motor vehicle in the event the Interstate Commerce Commission should grant him authority to do so?

A. Yes.

Q. Now, do you support the application of E. L. Reddish for authority to bring into your plant inbound materials and supplies that you have described?

A. Yes, sir.

Q. Why do you support his authority to bring in the inbound?

A. Well, one of the main reasons is we have a condition that's—it isn't presently, it isn't right at the present time—why, we are able to get certain can sizes right in Fort Smith, but the American Can Company plant is being [fol. 312] closed there, officially, now, it's on November the 30th, where those cans will not be available to us. And, of course, the result is the nearest point to us would be Springdale, Arkansas, and they do not make all the various can sizes and the type of tinplate that is required to pack the foods that we pack, so the result is that we



have to arrange for the type of can that we are going to use or planning to use far enough ahead in order to get it in time for use of that particular type of can, and we don't always have time to do that because if our experiences has been in handling it by common carrier, whether it's by truck or by rail, that it takes all the way from five to seven days. Well, we can't, when you are fooling with raw material, when it's ready for harvest, it's a perishable product and there is sometimes that you can't wait that long. But with this type of service, well, we found that we can get those cans in within 24 or 36 hours, which solves our problem, that it would be possible for us to get them in. Otherwise, the same thing applies as other supplies, like boxes, because we use many different sizes of boxes.

Q. Now, would you be prepared to enter into a contract to perform in the event—

A. (Interrupting) Yes, sir.

Q. (continuing) —E. L. Reddish. Has he ever performed any service for the Keystone Packing Company?

A. No, sir.

[fol. 313] Q. Have you entered into any contract with E. L. Reddish?

A. No, sir.

Mr. Layne: That's all I have, thank you.

Cross examination.

By Mr. Jones:

Q. Is your support of the application as to the area which you mentioned in the record to which you were merchandising?

A. Well, yes, those points and other points as well or whatever is in there, the same points, destination points that they have, that's what we—E. L. Reddish.

Q. You mean the entire application?

A. Yes.

Q. You have never sold into the states of Colorado or New Mexico?

A. That is correct.



Q. And do you have any present solicitation in either of those states?

A. No.

Q. Same applies for Nebraska?

A. That's right.

Q. Same as to North and South Dakota?

A. Right.

Q. Minnesota?

A. Right, yes.

Q. Iowa?

A. Iowa.

[fol. 314] Q. Have you ever made any effort to obtain transportation in any of those states?

A. No, we have not.

Q. Have you ever made any investigation as to what service might be available in those states?

A. No, we haven't.

Q. Now, in Kansas, I believe you said you sold to Wichita, and Topeka?

A. That's correct.

Q. How were those transported?

Q. Some of it has been taken over there on our own trucks and some by common carrier.

Q. What common carrier?

A. Jones Truck Line.

Q. To these points direct?

A. I don't know.

Q. Was the service satisfactory?

A. It was satisfactory, that is, the nature of the shipment was satisfactory, yes.

Q. And have you made any investigation as to the service available to you in the State of Kansas, other than Jones?

A. Not other than Jones I haven't.

Q. You had no occasion?

A. I had no occasion up until now.

Q. If you had a service available to you by an irregular [fol. 315] route carrier who could serve you from Fort Smith to points of the various states that I have mentioned, in some cases single line and other cases, for

example, change of trailer with another carrier, would you have any objection of doing that, sir?

A. No, sir.

Q. Do you have any reason why that service won't meet your needs?

A. Well, I don't know because I have never pursued it, I don't know if it would serve the purpose or not.

Q. I am assuming that they would furnish with drop-off shipments.

A. Well, I don't know because I haven't asked for that.

Q. That's one of the things that you wanted, the privilege of drop-off shipments?

A. That is right.

Q. So that you could pool shipments to several of your customers in one truckload?

A. Yes.

Q. Either by the applicant or other carrier, you would expect to arrange your business so that you could ship a full truckload out of your canning factory destined to one or more customers in these states?

A. Yes, sir.

Q. And if you had a combination carrier with a combination of such states as western Kansas, western Nebraska, Colorado, northern New Mexico, do you have any reason why they couldn't?

[fol. 316] A. Well, I don't know.

Q. Well, I am assuming.

A. I am not in a position to say if they could or not, we would have no objections, if they could, of using them, too.

Q. And I believe you have nothing coming inbound?

A. We haven't up until now, no.

Q. Do you have anything—

A. (Interrupting) Well, I really haven't investigated what materials out there that we could purchase in our operation that would be of benefit.

Q. Now, the same applies to the Dakotas and Minnesota?

A. Not necessarily, there is potatoes grown up there, and we do can potatoes.

Q. Let us say outside of exempt commodities.

A. Nothing outside of exempt commodities.

**Q.** We are talking now of Minnesota and Dakotas.

**A.** Yes.

**Q.** And Iowa also?

**A.** Yes, that would apply the same, nothing but exempt.

**Q.** Now, into Illinois, how much of your shipments go there?

**A.** What do you mean?

**Q.** By what carrier?

**A.** Oh, the carrier. Well, we ship by common carrier.

**Exam. Hanback:** Rail or motor?

**The Witness:** Both.

[fol. 317]            **By Mr. Jones:**

**Q.** What motor carrier?

**A.** Well, we shipped Arkansas Best into Chicago, we also shipped Jones Truck Line in Chicago, we have shipped by rail into Chicago. That's Kansas City Southern, the East Missouri and K.M.T. out of there, and we have shipped about, of course, everything that we have shipped by rail out of Forth Smith originates on the Kansas City Southern, and, of course, we usually give them the haul and they handle freight there just like the truck lines handle it. We don't know what truck lines make actual delivery, if there is an interchange en route; we don't know that.

**Q.** By Jones Truck Line or Arkansas Best, either one, by an interline over Kansas City with a carrier that can serve all points in the state of Illinois, irregular route service, do you know of any reason why that wouldn't meet your need as to the State of Illinois?

**A.** No, I don't think it would meet our needs. We increase our sales to customers where they are buying in small quantity, I don't believe that it would meet our needs.

**Q.** Why not?

**A.** Because I don't think that they could make the deliveries that we would want made into those points and give the service that our customers expect or demand.

**Q.** Well, would that be because it went through Kansas City?

**A.** Well, I don't know why it would go through Kansas City.

[fol. 318] Q. Well, I am speaking of Buckingham Transfer, it has authority to all points in the State of Illinois by connecting at Kansas City.

A. Well, of course, you mean that if we ship to where this truck line that you mentioned is handling it into Illinois, you serve those points, whether or not it would be satisfactory?

Q. Well, do you know any reason why it would not be, providing they serve every point in the State of Illinois, I mean have that authority so that they could furnish you with a drop-off service?

A. Well, that would depend upon the service the customer demanded as to the time of delivery. Now, it's a question as to whether or not they would be able to deliver that merchandise when the customers wanted it.

Q. Well, do you know any reason why they couldn't deliver it to you?

A. No, I don't know, because I have never used their truck line.

Q. And you never investigated what type of service?

A. No, sir.

Q. You have no objection to using the services, would that be right, Loving Truck Lines or any of the Buckingham Trucking Company?

A. No, sir.

Mr. Jones: That's all I have.

Cross examination.

[fol. 319] By Mr. Ashton:

Q. You read a list of places that you served some source, was that Exhibit 3?

Mr. Layne: Yes.

By Mr. Ashton:

Q. You mentioned St. Louis, Missouri, for example, was that on that list?

A. No, it isn't on there. I was asked what points we served.

Q. You were not reading points that were on that list?

A. No, I was telling you the points that we served.

Q. By states?

A. Yes, by either commercial carrier, common carrier, or by our own trucking operation.

Q. Well, now, among the points that you named were St. Louis, I believe, Kansas City, Chicago, Wichita, Springfield, Missouri, Joplin, Oklahoma City, Tulsa, Memphis, Fort Worth and Dallas?

A. Not Fort Worth. Dallas.

Q. Dallas. Do you understand that this applicant is not asking for authority to serve any of those points?

A. Yes.

Q. Now, what percentage of sales to private customers—by that I mean other than the Steele Packing Company—do you sell in those points that I have just mentioned, out of the 25 per cent?

A. Yes, 25 per cent. Of course, we have increased those sales now since Steele has had its labor difficulties, so that we are selling more directly now, not through Steele but [fol. 320] in our—from our own selling organization than we did before. Now, you want the—

Q. (Interrupting) It's now 35 per cent?

A. I would say 35 per cent. You want to know how much we ship into the points that you mentioned there?

Q. Yes.

A. I would say possibly 25 per cent of the 35 per cent into those points.

Mr. Jones: I am not sure what is meant by the record, I don't know if that is a quarter of 35 per cent or 25 per cent.

The Witness: Yes, that is a quarter of 35 per cent, about 25 per cent of our sales other than to Steele Canning Company are going into those markets.

Mr. Matthews: So that the balance of that 25 per cent is not going to the points?

The Witness: You mean 75 per cent of the 35 per cent?

Mr. Matthews: That's right.

The Witness: Yes.

By Mr. Ashton:

Q. Are going to the other points in those states that you mentioned before?

A. Yes, that is correct.

Q. One point to which you shipped to Springfield, Missouri?

A. You say we ship, I don't recall any recent shipments there, but we have shipped there.

Q. What service did you use to Springfield, Missouri?  
[fol. 321] A. We used rail, Frisco.

Q. Had you ever used the services of Frisco Transportation Company?

A. No, sir.

Q. Are you familiar with that?

A. Yes, I am familiar with that.

Q. If this authority is granted Mr. Reddish seeks, what would you do about the shipments that you are now sending the motor common carriers, will you continue?

A. I will continue, I see no point in not continuing.

Q. That service is satisfactory?

A. We have also used common carrier both in trucks and rail. We not only ship out but we receive.

Q. And that service is satisfactory?

A. It is very satisfactory for that purpose.

Q. Have you ever discussed with any motor common carrier an establishment of some method of setting up a distribution system using common carriers, setting up a peddle run along regular route authority?

A. Well, I don't know what you mean by "peddle run."

Q. Well, a method of distribution whereby you would load a truckload of commodity at Fort Smith and drop off partial shipments along the way until you reach some other destination.

A. Yes, yes, I have. I have discussed recently with two different truck lines about the possibility of going into certain territories with drop shipments, say, of four, five, six drops to each truckload.

Q. What did they have to say, is that satisfactory to you?

A. No, the information that they supplied, of course, that was only recently, but the information that they gave me, it would not be satisfactory to handle the type of customers



that we—apparently, that we are going to have to sell in the future.

Q. Now, you discussed that with two truck lines, Jones, and Arkansas?

A. Jones and Arkansas.

Q. Not with Mercury?

A. No.

Q. Not with Frisco Transportation?

A. No.

Mr. Ashton: That's all.

Cross examination.

By Mr. Matthews:

Q. In your opinion, the regular route common carriers as far as you are concerned are not satisfactory to use on these small railroad shipments, is that what you have been testifying to?

A. Well, I said this, that, of course, we haven't gone into that type of selling, that's what we are planning to do in the future in order to gain back some of the sales that we feel that we have lost because of Steele Can Company's difficulty. And we also realize that we were at a disadvantage [fol. 323] when the thing happened because we were selling Steele, and if either we will have to use that or we will be more or less at a standstill, we can't increase our packs.

Q. What I am trying to get at, why you would use the regular route common carrier service?

A. We don't refuse to use it.

Q. And it is satisfactory?

A. Yes.

Q. And is that truckload or less truckload?

A. No, they are truckload.

Q. And as less truckload you feel it is not satisfactory?

A. We don't sell in less truckloads, we don't have any LTL or any LCL shipments. We only sell in truckloads or carload, but we may have a number of drops in a truckload, but as far as shipping anything less than truckload—we don't ship anything.

Q. So we will understand, will you define for me what a less-truckload shipment is?

A. Well, I would say less than truckload would be something which is less than 18,000 pounds.

Q. Say a shipment that weighs 5,000 pounds would according to your definition be a less-than-truckload shipment?

A. Yes.

Q. You don't have less than 5,000-pound weight, roughly?

A. Yes, we do have less than 5,000, we may have shipments of 2500 or 3,000 pounds.

[fol. 324] Q. And you do have less-than-truckload shipments?

A. Wait a minute, I didn't say that, I said that we have orders. In other words, we have orders of less than two or three thousand, we will say two or three thousand pounds.

Q. To a particular customer?

A. To a particular customer.

Q. Just a minute. You don't consider that two or three thousand pound shipment a less-than-truckload shipment?

A. Well, two or three thousand pounds is less than—

Q. (Interrupting) Then you do have some of that nature, don't you?

A. What do you mean, we do have?

Q. Well, have you been shipping—

A. No, sir, we have not shipped any two or three thousand-pound shipments by ourselves, we always shipped it, two or three thousand pound shipments in pool trucks along with other—

Q. Along with another shipment of two or three thousand pounds?

A. Well, it depends, enough to make up a truckload.

Q. Anyway, according to your definition, you don't consider each of those orders to be less than a truckload shipment considered by itself?

A. No, we do not.

Q. What is it?

A. Well, we give them a regular truckload rate on it because we have to do that because of competitive conditions [fol. 325] in our industry.

Q. Can you explain that?

A. Well, I don't know what you are trying to get at. I told you that two or three thousand pounds don't constitute a truckload.

Q. But you do have orders of that size?

A. Well, yes, we have them, and we expect to have more, but we pool those with orders in order to make a minimum truckload.

Q. And why?

A. In order to make sales.

Q. How does that affect your sales?

A. Why?

Q. Is it because you are not able to compete pricewise with your competitors you are able to ship these various orders separately, that is the idea?

A. You mean with the competitors in our industry?

Q. Yes, sir.

A. Yes, that's right.

Q. So that if you have to ship these by itself, it would be costing too much?

A. Well, of course, we sell on an f.o.b. basis, it would cost the customer more than he could buy it out from—

Q. So I take it that your opinion, then, is essentially the same as that expressed earlier in this hearing by Mr. Turnbow and by the other shipper witness, which was essentially [fol. 326] that the LTL service on regular route carrier is unsatisfactory because prohibited its rights?

Mr. Layne: That is not a correct statement of what the record said or witnesses said. The two witnesses said, according to what is in my record, the rates had an effect on it but also the service was unsatisfactory, it would be performed either specific of the amount of the rate. Now, if you want to put both of those together and ask the witness—

Mr. Matthews: No, that is all.

Cross examination.

By Mr. Gunn:

Q. You don't have any idea how much business you expect to pick up by going out soliciting to the area that you choose?

A. No, there is no way for me to determine right now how much this type of business that we could get.

Q. Have you ever investigated the services that L. A. Tucker Truck Lines offer?

A. No, sir.

Q. Are you familiar with Ely Truck Line?

A. No, I am not familiar with that truck line.

Q. You say you have two new pieces of equipment, Mr. Hunter, do you plan on keeping that equipment?

A. No, we are not, we don't intend to stay in the trucking business if we can get the type of service that is necessary for our operation, our sales, we will be very happy to get out.

[fol. 327] Q. From whom did you buy that equipment, Mr. Hunter?

A. From the International Harvester Company at Little Rock, Arkansas.

Mr. Gunn: I have no further questions.

Cross examination.

By Mr. Durden:

Q. Mr. Hunter, I believe you stated that you had used Mr. Reddish for emergency and temporary authority?

A. No, we have not. That is only in sales to Steele Canning Company, Springfield, their trucks come down and pick up merchandise that we have sold to Steele, but they haven't hauled any for us.

Q. They have not. Shipments were used for customers other than Steele?

A. That's right.

Q. You say about 75 per cent of your production pertains to Steele?

A. It has up until the time this labor difficulty began.

Q. And since that time—

A. It's fallen off, now down to probably 60 per cent of what it originally was.

Q. Shipments that you made through Steele at Springdale by way of Mr. Reddish, are they always truckloads?

A. Well, as far as I know they are, yes.

Q. Full truckloads as far as you know?

A. Yes.

[fol. 328] Q. You haven't actually used for your own carriage, you don't know what his service would be as far as you are concerned at all, do you?

A. Yes, yes, I believe I do. Of course, with their trucks coming into our plant and picking up merchandise for Steele, it gives us some idea as to how they would handle our business.

Q. Do you have some information as to how he handles the shipments for Steele?

A. No, I don't have any direct information as to how he handles it for Steele, it's what we observed there at the plant.

Q. Now, suppose, Mr. Hunter, that you wanted a load of cans from Norwood, Indiana—

Exam. Hanback (interrupting): Norwood, Ohio.

By Mr. Durden:

Q. Let's suppose you need a load of cans from Norwood, Ohio, tell us how Mr. Reddish would get that load of cans to you any quicker than a motor common carrier.

A. Well, because we very often—there are seldom weeks pass that we don't take—we are not making shipments into Cincinnati, or a nearby point.

Q. Now, you are assuming, are you not?

A. No, not assuming.

Q. Wait a minute. You are assuming that Mr. Reddish would have a vehicle in that vicinity, that is correct?

A. Yes, if he couldn't, if he didn't have—

Q. Now, if he did not have a vehicle in that vicinity, how [fol. 329] would Mr. Reddish handle the load of cans to you?

A. Well, he wouldn't handle it if he wasn't in that vicinity.

Q. And what methods do you use then?

A. We probably would use common carrier.

Q. Probably?

A. Yes, if we weren't operating our own trucks that's the way we would get it.

Q. That is the way you get your cans now?

A. Yes, sir, we get them by our own trucks and common carrier.

Q. Motor?

A. By rail. There is an exception there at Springdale, we do get some cans in by a truck line at Springdale, it's Arkansas Transit.

Exam. Hanback: Intrastate?

The Witness: Intrastate, yes, sir.

By Mr. Durden:

Q. Suppose you want a load of boxes from Memphis, how would you get that?

A. Well, that depends on how quickly we wanted it or the size of the boxes that we need, whether or not they were available there. When we get them in it's by common carrier or by our own private trucks.

Q. You wouldn't expect Mr. Reddish to haul those boxes for you from Memphis, would you?

A. Well, yes, if he is—we were doing business with him, we would if he was in that vicinity.

[fol. 330] Q. Are you familiar with the amendment that he made to you?

A. No, I am not familiar with that part.

Mr. Layne: Here it is, Exhibit No. 1.

The Witness: Articles other than boxes.

By Mr. Durden:

Q. You would expect them to haul the boxes for you from Memphis if he had a truck in that vicinity?

A. Yes, if he has authority to do it I would.

Q. If he had the authority and if he had a truck in that vicinity?



**Cross examination.**

**By Mr. Ryan:**

**Q.** Has your company purchased canned goods from any [fol. 339] point named in the application?

**A.** In interstate you mean?

**Q.** Yes.

**A.** No.

**Mr. Ryan:** That's all I have.

**Mr. Hayes:** No questions.

**Exam. Hanback:** Any redirect?

(No response.)

**Exam. Hanback:** You are excused.

(Witness excused.)

[fol. 340] **Exam. Hanback:** We will take a short recess.

(Short recess.)

**Exam. Hanback:** Hearing is resumed.

**Mr. Gunn:** During the recess, Mr. Examiner, the applicant and Tucker Truck Lines agreed to a stipulation, and I would like to read the stipulation into the record.

I would like to have the Certificate of Public Convenience marked Exhibit No. 9.

**Exam. Hanback:** Exhibit No. 9 marked for identification.

(Protestant's Exhibit No. 9, Attorney Gunn, was marked for identification.)

**Mr. Gunn:** And the list of equipment marked Exhibit No. 10.

(Protestant's Exhibit No. 10, Attorney Gunn, was marked for identification.)

**Mr. Gunn:** A map of operating authority marked Exhibit No. 11.

(Protestant's Exhibit No. 11, Attorney Gunn, was marked for identification.)

Mr. Gunn: The following is a stipulation entered into between the parties, the applicant and protestant Tucker Truck Lines, stipulate to the following:

That Tucker Truck Lines is presently operating under its authority as evidenced by Certificate of Public Convenience and Necessity No. MC-3062, marked Exhi. No. 9;

That Exhibit No. 10 represents a true and correct equipment list of L. A. Tucker Truck Lines;

[fol. 341] That Exhibit No. 11 represents a true and correct map of its operating authority;

That St. Louis, Missouri, and Memphis, Tennessee, are interchange points for L. A. Tucker Truck Lines.

Mr. Layne: That's agreeable with me.

Exam. Hanback: Very well.

#### OFFERS IN EVIDENCE

Mr. Gunn: I would like to at this time offer Exhibits Nos. 9, 10, and 11.

Mr. Layne: No objection.

Exam. Hanback: Received in evidence.

(Protestant's Exhibits Nos. 9, 10, and 11, Attorney Gunn, were received in evidence.)

Mr. Gunn: And with that I would like permission to leave the hearing room.

Exam. Hanback: All right.

Mr. Eyster: During recess the applicant and protestant Be-Mac Transportation Company, Inc., is operated under Certificate No. MC-10872 and subs. They are as shown on Exhibits Nos. 12 and 13.

Exam. Hanback: They will be marked.

(Protestant's Exhibits Nos. 12, and 13, Attorney Eyster, were marked for identification.)

Exam. Hanback: And you stipulated that your company is operating as indicated on both exhibits?

Mr. Eyster: Yes, sir.

[fol. 342] Exam. Hanback: Very well.

Mr. Eyster: That is it. I offer them in evidence.

Exam. Hanback: Any objection?

Mr. Layne: No objection.

Exam. Hanback: Exhibits 12 and 13 received in evidence.

(Protestant's Exhibits Nos. 12 and 13, Attorney Eyster, were received in evidence.)

Mr. Jones: Mr. Examiner, I request that an identification number be assigned to the certificate issued to Howard J. Nelsen and James Melvin Nelsen.

Exam. Hanback: The document is marked Protestant's Exhibit No. 14 for identification.

(Protestant's Exhibit No. 14, Attorney Jones, was marked for identification.)

Mr. Jones: In agreement with counsel for applicant, I offer this exhibit in evidence with no further stipulation. I am doing this on behalf of Mr. Max Harding.

Mr. Layne: I have no objection.

Exam. Hanback: Very well. Exhibit No. 14 is received in evidence.

(Protestant's Exhibit No. 14, Attorney Jones, was received in evidence.)

Mr. Jones: Call Mr. Rogers.

---

Mr. ROGERS was sworn and testified as follows:

[fol. 343] Direct examination.

By Mr. Jones:

Q. State your name.

A. My name is Rogers.

Q. What is your occupation, sir?

A. I am vice-president of the Wright Motor Lines, Inc.

Q. How long have you had that position?

A. Five and a half years.

Q. What is the business?

A. Motor transportation.

Q. How long has it been in operation?

A. Since before the FTC Motor Carrier Act.

Q. Who are the officers and stockholders of the company?

A. Mr. George Wright is president; Viola Wright, secretary-treasurer; Rodney Easton, vice-president, and myself.

Q. And are they the stockholders?

A. They are the stockholders.

Q. Is there any application pending effecting a change in any of the stockholders?

A. Yes, sir.

Q. What is it, please?

A. There is an application pending whereby Mr. George Wright and Lowell Wright are selling their interest in the company.

Q. To whom?

A. To the Earl Bray Corporation.

Q. Will that affect the operations or management for the company?

[fol. 344] A. No, sir.

Q. Will you still remain with the company and so will Mr. Easton?

A. Yes.

Q. Has your company been issued a certificate by the Interstate Commerce Commission, Certificate number MC-114364?

A. Yes.

Exam. Hanback: It will be marked Exhibit No. 15.

(Protestant's Exhibit No. 15, Witness Rogers, was marked for identification.)

By Mr. Jones:

Q. Will you examine what has been identified as Exhibit No. 15, and state if that is a true and correct copy of the certificates issued to your company?

A. Yes, sir, it is.

Q. Does your company operate equipment under that authority?

A. We do.

Q. Will you briefly describe your equipment?

A. We have and operate 84 trailers and 82 tractors. Six of the trailers are tank trailers, the balance of them

are van trailers, with the exception of two, van trailers, van type.

Q. And the tractors?

A. The tractors are all just tractors, diesel and gasoline tractors.

Q. Are any of them equipped with sleeper-cabs?

A. Yes, sir.

[fol. 345] Q. Now, of this equipment, how much does the company own and how much is leased equipment?

A. The company owns 60 of the trailers, 32 of the tractors.

Q. And what type of lease is entered into between Wright Motor Lines and the lessors?

A. We have a long-term lease as prescribed by the ICC.

Q. Where does your company have terminals?

A. At Rocky Ford, Colorado.

Q. What do you have there?

A. We have our general office, some maintenance, and dispatching office.

Q. What do you have in the shop facilities?

A. We have complete shop facilities where we do all our work.

Q. Do you dispatch from that office?

A. Yes.

Q. You are here for the portion of the application—

A. Yes.

Q. What portion?

A. The portion of canned goods from Springdale and Lowell, Arkansas, to Colorado; the portion on canned goods from Springdale, Arkansas, to points in New Mexico on and north of U. S. Highway 66; and to points in Nebraska, on and west of U. S. Highway 83.

Q. Does your company permanently hold authority for these commodities?

[fol. 346] A. Yes, sir.

Q. Will you please call attention to the Exhibit No. 15.

A. Our authority from Springdale and a radius of 50 miles, they are of the state of Arkansas, as shown on Sheet No. 7.

Q. That's 50 miles of Springdale?

A. Of Springdale, Arkansas.

**Q. Does that include Lowell?**

**A. Yes, sir; our authority from Springdale, Arkansas, to New Mexico, and Colorado, is shown in Sub 7. We also protest—**

**Q. (Interrupting) Did you complete the outbound movement?**

**A. Yes.**

**Q. Do you have any authority from Colorado points to Oklahoma points?**

**A. Yes, sir, we do.**

**Q. What is that?**

**A. From Muskogee, Oklahoma, on page 7, to points in Colorado.**

**Q. Can goods from Muskogee, Oklahoma, to all points in Colorado?**

**A. Yes.**

**Q. Is that the purpose of this inquiry?**

**A. Yes, it is.**

**Q. For what reason?**

**A. For interline purposes.**

**Q. With what carrier?**

**A. Loving Truck Lines.**

**Q. And by interlining at Muskogee, Oklahoma, what can [fol. 347] you accomplish?**

**A. We can deliver to all points in Colorado to Fort Smith, and Westville, Oklahoma.**

**Q. As well as from Springdale and Lowell?**

**A. Yes.**

**Q. Now, on the movement in the opposite direction that you have some protest on that?**

**A. Yes, sir.**

**Q. Will you state that?**

**A. We are authorized carrier of sugar as shown on Sheet No. 6 of the original application, between Rocky Ford, Colorado, on one hand and other points in Oklahoma, and from Swink, Colorado, to points in Oklahoma. They are authorized to transport sugar as shown on Sub No. 12, Sheet No. 2, from Rocky Ford, Colorado, to points in Arkansas, on and west of Highway 65, which includes Springdale and Lowell.**



A. That's right.

Q. You have no assurance, do you, Mr. Hunter, that the vehicles that he presently has that he would have a truck in that vicinity?

A. No, I have no assurance, that's right.

Mr. Durden: I believe that's all.

Cross examination.

By Mr. Eyster:

Q. On Exhibit 3 I marked off as you were naming them, and five points in Illinois to which you are presently making sales, Carbondale, Kankakee, Murphysboro, Peoria, Springfield, and you also mention Chicago, however, in as much as Chicago is not in the application you could not use the applicant on shipments to Chicago, could you?

A. That's right.

Q. Now, then, have you any idea what your tonnage or what your customer in Carbondale would order at any one time?

[fol. 331] A. Well, quite often, straight truckloads.

Q. Straight truckloads?

A. Yes.

Q. And, of course, that is an average shipment?

A. No, I would say that it isn't.

Q. Have you any idea what an average shipment would be?

A. I would say there is times when we do go in there with a straight truckload, there is times we go in there with maybe two or three drop shipments, we never know those things.

Q. And that also applies to the others?

A. Yes.

Q. And supposing, sir, that you had an order from all five of those points—you said these are uncertain, so I am assuming that this could happen—that you had an order from each of those five points of 3,000 pounds each, would you use the applicant on such a shipment? That would be only 15,000 pounds.

A. Well, it would be up to us to get enough business, enough weight as to complete a truckload, regardless of the number of stops or drops, in order to complete the truckload.

Q. Supposing you had an order from Carbondale and Kankakee, as an illustration, in any one day of 3,000 pounds or of 5,000 pounds each requiring delivery within 48 hours, and you had no other orders in that direction, what would you do, pass up the sale?

A. Yes, we would.

[fol. 332] Q. And that would apply to all the other points?

A. That would apply, it would depend upon the customers, we would tell him the circumstances under which we would have to deliver it, and if it was acceptable to him we would deliver according to the way he would want it.

Q. Not by common carrier on a 5,000-pound shipment?

A. That would be up to the customers. I explained earlier, most of our sales are sold f.o.b. Fort Smith, it would be up to him to decide.

Q. Those are the only points in Illinois to which you are presently—

A. (Interrupting) Yes.

Q. And insofar as you are concerned, the other points in Illinois are immaterial?

A. No, I wouldn't say that. We hope to explore the other points in Illinois that are listed on here for—

Q. (Interrupting) But as of now you don't have any need?

A. No, sir, not up until now we haven't.

Q. Drops in sales to the Steele Canning Company. We have heard a lot today about the drop in sales of the Steele Canning Company goods in every instance, including your own testimony, it seems like you have a grand father date of the labor trouble that you had, is that correct?

A. Yes, that's correct.

Q. Of your own knowledge, sir, are you sure that the drop [fol. 333] in sales can be attributed to the labor trouble?

A. Yes.

Q. How do you know that?

A. Well, for the simple reason that they don't have the equipment to handle the volume of sales that they did before.

**Exam. Hanback:** Who is that?

**The Witness:** Steele Canning Company.

**By Mr. Eyster:**

**Q.** They have been running some of their own equipment?

**A.** Yes, sir.

**Q.** They also have been using them on temporary authority?

**A.** Yes, sir.

**Q.** Have the two, to your own knowledge, sir, by adding those, all of that equipment together, what Steele has been operating themselves and what they have been using under temporary authority, isn't that equipment approximately the same amount that they were using prior to this labor trouble?

**A.** No, sir, it is not.

**Mr. Eyster:** I think the record will speak for itself here. I have no further questions.

**Cross examination.**

**By Mr. Bazelon:**

**Q.** Mr. Jones asked you some questions about some western and northern states. The questions, generally speaking, were whether or not you have solicited business in the certain states, do you recall this?

[fol. 334] **A.** Yes.

**Q.** And whether or not you have used any common carriers to those states and whether or not you have investigated such service. I am going to ask you the same questions that he asked about several other states, and I would like to know what your answers would be. State of Arizona?

**A.** No, we have not made any sales into that state.

**Q.** Have you never solicited or investigated any service?

**A.** That is correct.

**Q.** California same answer?

**A.** No, we haven't in California.

**Exam. Hanback:** Same answer?

The Witness: Same answer with the exception that you are talking with recent—I presume since this—how long ago are you talking about? We have made shipments to California in the past.

By Mr. Bazelon:

Q. How long ago was it?

A. It's been about five or six years ago, we have made rail shipments.

Q. For the last three or four years?

A. No.

Q. Is the same true of Iowa?

A. Yes, it is true of Iowa.

Q. The same about the solicitation and the investigation and the trucking facilities?

[fol. 335] A. Yes, that's right, we have had no reason to solicit.

Q. How about Nebraska?

A. Same thing applies.

Q. And Wisconsin?

A. Same thing for Wisconsin.

Q. Now, when did the drop in sales take place with respect to the—

A. (Interrupting) Well, I would say nearly immediately when they entered into their labor difficulties, why we could see a difference in the sales.

Q. You mean before they had a strike?

A. Oh, no, I am talking about since the strike.

Q. The strike was in June, June of 1958?

A. Yes, I think the first part of June.

Q. So that the labor difficulties started about June of 1958, and shortly thereafter your sales dropped, is that correct?

A. Yes, I would say it was noticeable from the beginning.

Q. Well, this application was filed on May 13, 1958, which was prior to the strike and at that time you indicated that—or the application indicated that there was going to be—that your company was going to support the application and enter into a contract, so when that was done it was done before any drop in sales, that is right?

A. No, I didn't say that, I said most of the noticeable difference came after, say, June when the strike happened, [fol. 336] but even before that time, why, we felt the necessity of making some of arrangements, transportation arrangements such as we mentioned.

Q. Why is that, there wasn't any drop in sales was there?

A. Oh, yes, there was a drop in sales immediately when the difficulty started before the strike ever actually took place, but they were more noticeable after the strike took place because of lack of transportation.

Q. As I understand it, there wasn't any dropping of transportation or number of units until after the strike began, isn't that true?

A. Well, that is something I don't know, I don't know whether they had any drop in transportation or not.

Q. You said you had some trucks for intrastate. How many do you have?

A. Two.

Q. Are they the tractor-trailer type?

A. No, they are the bed truck type, ton and a half.

Q. How long has your company been in business, sir?

A. The present company four years ago last March the 1st.

Q. And I didn't get your position with the company.

A. I am general manager.

Q. Did you ever work for the Steele Canning Company?

A. No, sir.

Q. Is there any owner-shipper connection between the two companies in any way?

[fol. 337] A. No, sir.

Q. How long has your company been selling approximately 75 per cent of its output to Steele?

A. I would say for approximately four years.

Q. Isn't it a fact, sir, that actually your company has sold as much as 90 per cent of its output with the Steele Canning Company?

A. No.

Q. Well, then, do I understand that Mr. Turnbow was incorrect when he said that approximately 300,000 to

500,000 cases per year were purchased from your company?

A. Well, I couldn't tell you the actual number of cases. I would say I was making an estimate of approximately the percentage of our pack that Steele buys. Now, it could vary, it varies with the pack.

Q. So it could have been as high as 90 per cent then, isn't that right?

A. You mean of our total pack?

Q. Yes.

A. It could be, yes, it depends on the pack.

Q. Now, in 1957, what per cent was it, if you know?

A. I believe about 75 per cent.

Q. Now, the remaining 25 per cent, how was that shipped out?

A. It was shipped out by common carrier, by rail and truck common carrier.

[fol. 338] Q. Of the 25 per cent, how much went by truck?

A. Well, I would say of the 25—do you want—oh, the 25 per cent, I would say 75 per cent.

Q. Was that truckload shipments or LTL?

A. No LTL shipments, all truckloads.

Q. Were they straight loads or drops?

A. In most instances straight loads, up until that time we hadn't solicited much of that type of business.

Q. Isn't it true that a customer's—correct me if I am wrong—that a customer pays less the more he buys?

A. No, that is not true.

Q. You mean there is no difference in the price?

A. We don't give quantity discount.

Q. The price that a customer pays for 3,000 pounds of product would be the same as 30,000 pounds per unit?

A. That's right.

Q. That is right?

A. That's correct.

Q. Is Elwood, Indiana, in the commercial zone of Chicago, do you know?

A. No, Elwood, Indiana, is more south of Chicago. I don't know how many miles, but 200 miles probably.

Mr. Bazelon: That's all I have.



Q. And are you authorized to transport sugar from Swink to Rocky Ford, Colorado, and to the points involved in this application?

A. Yes, sir.

Q. Anything else?

A. We are authorized to transport canned goods from Denver to points in Oklahoma, as shown on Sheet No. 7 of the original application, from Denver to Fort Lupton, and so forth. We are authorized to transfer canned goods [fol. 348] from points in Arkansas, as show on Sub 12.

Q. Don't read them.

A. All right.

Q. Is that the extent of your protest?

A. Yes.

Q. Does your company haul exempt commodities from Colorado to points eastbound?

A. Yes, sir, we do.

Q. And are you protesting that feature as well?

A. We are, yes, sir.

Q. Does your company have any canned goods authority—strike that. Does your company operate presently in the transportation of canned goods?

A. Yes.

Q. To what extent, sir?

A. We are transporting about six to seven million pounds a year.

Q. And for how long a time has your company been engaged in that?

A. We have been engaged in transporting canned goods for about eight years.

Q. Will you name some of the companies from whom you are transporting canned goods?

A. We transport canned goods from the Kuner-Empson Company, Rickets Canning Company at Crowley, Colorado; the Western Canning Company, LaJara, Colorado; Welch [fol. 349] Grape Juice Company at Springdale, Arkansas.

Q. Do you transport canned goods into the State of Arkansas?

A. Yes, sir, we do.

Q. And do you transport canned goods from other destination points?

A. Yes, sir.

Q. From what points in Arkansas have you transported canned goods?

A. We have transported from Springdale only to Colorado, New Mexico, and northern New Mexico, and western Nebraska.

Q. Has that been for the Welch Grape Juice Company?

A. Yes, sir.

Q. That have you been able to take care of them?

A. Yes, sir.

Q. In your years of the service to the canned goods industry, what have you found in general to be the nature of their demand upon you for service?

A. Their demands have been very lenient, usually from 24 to 48 hours demand for trucks.

Q. Do you get faster request than that sometimes?

A. Occasionally.

Q. Have you been able to take care of them as they come in?

A. Yes, sir.

Q. Do you transport other commodities into the States of Arkansas, Missouri, and Oklahoma?

[fol. 350] A. Yes, sir.

Q. What other commodities?

A. We transport produce, fruits of all kinds, and sugar, dry beans.

Q. To what extent could you have equipment in the State of Arkansas?

A. Oh, we have from two to four a day usually.

Q. And do you have additional equipment in the adjacent states of Oklahoma and Missouri?

A. Yes, sir.

Q. How do you contact your drivers of your equipment which may be in Arkansas, or the adjacent states?

A. They are contacted by telephone.

Q. If the Steele Canning Company or one of the other companies in the State of Arkansas, or in Oklahoma, say Arkansas, were to call you at Rocky Ford, would you accept the call collect?

A. Yes, sir.

Q. And if they were to call you for service, what would you do?

A. We would dispatch the nearest truck there for their plant for loading.

Q. And is that the way you have been handling the orders in the past?

A. Yes.

Q. And will you state whether or not your business has increased during that period?

[fol. 351] A. It has consistently increased.

Q. Do you have complaints from the canning company as to the manner in which you have been serving them?

A. No, sir.

Q. Did you hear the testimony of the type of service desired at the destination area?

A. Yes, sir.

Q. As to drop-off shipments?

A. Yes, sir.

Q. Does your company provide that shipment?

A. We do.

Q. Is the common with your line in serving the canning industry as well as other industries?

A. Yes, sir, it is.

Q. If you had a shipment to be divided between northern New Mexico, and western Nebraska, and Colorado, would you and could you do that?

A. Yes, sir.

Q. Do you do that as a matter of fact?

A. Well, we haven't split between northern New Mexico, and Colorado, and western Nebraska, on one load; we have split loads between western Nebraska and Colorado, and between Northern New Mexico and Colorado.

Q. That would be the only logical differential, would it not?

A. That's right, shippers usually appreciate those things.  
[fol. 352] Q. Now, have you made any effort in the past to obtain any business in the Steele Canning Company?

A. Yes, in 1953 I made a couple of calls to Devine in the Steele Canning Company and was told they had their private trucks and wasn't interested in the common carrier service.

Q. Did you follow that up?

A. After the second time, no, sir.

Q. When was the second time?

A. Well, it was in the latter part of 1953, or latter part of 1954.

Q. Then after the application was filed and you found that they might be interested in outside service, did you contact them?

A. Naturally, I wrote them.

Q. Did you do anything further?

A. Yes, I wired them and told them that we had service here available to them.

Q. As a result of that solicitation have you obtained any business from them?

A. No response whatever.

Q. If they were to offer you business into northern New Mexico, any points in Colorado, or western Nebraska, from Springdale or from any of the origins mentioned, would your company handle it?

A. Yes, sir.

[fol. 353] Q. And if it were from a point other than Springdale or Lowell, how would you handle it?

A. In interline service with Loving Truck Line.

Q. Have you discussed that matter with the management of Loving Truck Line?

A. Yes, sir.

Q. And are they willing to enter into such an arrangement with you?

A. They are.

Q. Did you in your solicitation mention your abilities and authority to transport sugar and canned goods east-bound into Arkansas?

A. I don't recall specifically, I think, though, that I did.

Q. And do you have that service available?

A. We have that available.

Q. Now, do you need that business?

A. We do, yes, sir.

Q. And do you stand ready, able, and willing to perform service into the area in which you have mentioned?

A. Yes, sir.

## OFFER IN EVIDENCE

Mr. Jones: Mr. Examiner, I offer Exhibit No. 15.

Exam. Hanback: Any objection?

(No response.)

Exam. Hanback: Received in evidence.

(Protestant's Exhibit No. 15, Witness Rogers, was received in evidence.)

[fol. 354] Cross examination.

By Mr. Layne:

Q. When was the last time you entered?

A. Never had occasion.

Q. What's the distance from Westville, Oklahoma, to Muskogee, Oklahoma?

A. I should judge about forty-five to fifty miles.

Q. And Loving Truck Line is on a border of 40, turns it over to you?

A. Yes, sir.

Q. How is that handled, do you have a map at Muskogee, Oklahoma?

A. No, sir.

Q. Where is the driver of Loving going at that point?

A. I don't know.

Q. Where does your driver come from at that point?

A. Possibly from Springdale, Arkansas.

Q. Do you mean he comes through there with the driver of Loving, how did he get there?

A. No, we have equipment in Springdale practically every day.

Q. No, we were coming from Westville, Oklahoma, Mr. Rogers, tell me about that.

A. Well, that is what I am telling you, that would be handled on the MC-43 common carrier leased to another common carrier. We would lease our equipment to Loving Truck Lines, transport it from—

[fol. 355] Q. Would the drivers, could that driver be the same driver for both common carriers?

A. Yes, sir.

Q. That's your understanding of the regulation at the present time?

A. Yes, sir.

Q. And so that you would haul this you trip lease equipment between the two, Loving and Wright, trip lease equipment, that is right?

Mr. Jones: I object, it is a transaction, it is covered under the rules and regulations of the Commission.

By Mr. Layne:

Q. I want to find out if you trip lease your driver and a tractor to Loving?

A. That is permissible.

Q. Tell me.

Exam. Hanback: Objection overruled.

By Mr. Layne:

Q. Tell me about the lease. We have a shipment that starts at Springdale, Arkansas, with a partial load, who picks that up under your arrangement with Loving?

A. That would be—shipment would be made on the Wright Motor Lines, that's the only pickup.

Q. That's one pickup. We have another pickup point at Lowell, Arkansas, and then we pick up at Fort Smith, Arkansas, and Westville, Oklahoma, and we are going to do it, too, in conjunction with Loving. You tell me who starts out.

[fol. 356] A. Loving.

Q. And who starts out at Lowell?

A. Loving.

Q. And Fort Smith?

A. Loving.

Q. And at Westville?

A. Loving.

Q. And this is your tractor and trailer and you driver leased to Loving, is that it?

A. Yes.

Q. And then when you get to—where is it now, some place in Oklahoma?



A. Muskogee.

Q. What happens?

A. The lease of Loving Truck Line is completed, from there on it moves on over Wright Motor Lines.

Q. And that's the way you propose to handle this traffic?

A. We are handling traffic.

Q. That's the way you are doing it now with Loving?

A. Not with Loving.

Q. In that arrangement that you are talking about, isn't that an arrangement that you discussed in order to propose this?

A. In the arrangement that can be set up, if the shippers need the service, we can provide it for him.

Q. Well, you didn't answer my question.

[fol. 357] Mr. Jones: Well, I am going to object on the grounds it's argumentative.

Exam. Hanback: Do you understand the question?

The Witness: No.

Exam. Hanback: Objection overruled.

By Mr. Layne:

Q. You set up these discussions with Loving in conjunction with opposing this application, didn't you, Mr. Rogers?

A. We have discussed it in opposition of the application, yea, but we have discussed leasing operation for two or three years.

Q. Now, do I understand that you do not have a terminal in Arkansas?

A. No, sir.

Q. Do you have a terminal in Oklahoma?

A. No, sir.

Q. Your only terminal is located in Colorado?

A. That's correct.

Q. Your drivers are all dispatched out of Colorado?

A. Yea, sir.

Q. And you are dependent so far as pickup in Arkansas is concerned upon the location of your vehicles in Arkansas?

A. All carriers are dependent.

Q. Right now we are talking about Wright Motor Lines, are they?

A. Yes, sir.

Q. Now, you said you obtained canned goods from Welch?  
[fol. 358] A. Yes, sir.

Q. Is that canned grape juice?

A. Yes, sir.

Q. Canned vegetables?

A. No canned vegetables.

Q. Now, tell me how you would handle a shipment from—that would originate at Springdale and Lowell, and Westville, Oklahoma, that would have a drop at Liberal, Kansas, and finish at a point in Colorado.

A. That could not be handled in connection with our line.

Q. Tell me how you would handle a shipment that originated in Springdale, Lowell, Fort Smith, and went to a point at Oklahoma, for final delivery in Colorado, how would you handle that?

A. Do you mean a drop in Oklahoma?

Q. Yes.

A. We would transfer.

Q. Would the same answer be true if you were to drop in northern New Mexico?

A. Yes, sir.

Q. Tell me how you would handle these shipments.

Mr. Jones: Do you mean a drop in Oklahoma, and New Mexico?

By Mr. Layne:

Q. Tell me how you would handle a shipment from Steele Canning Company that originated at Westville, Oklahoma, Fort Smith and Lowell, Arkansas, with a drop in Missouri, and another drop in eastern Nebraska, and a drop in western Nebraska.  
[fol. 359] A. We don't handle that, we couldn't handle that.

Q. As a matter of fact, if Steele Canning Company originated a shipment at Lowell, Arkansas, and Spring-

dale, Arkansas, to go to New Mexico, you couldn't handle that shipment, could you?

A. Yes, sir.

Q. To originate—if any part of the load originated at Lowell, as far as New Mexico, you couldn't handle that?

A. No.

Q. The same thing be true with respect to Nebraska?

A. Correct.

Q. Does your transportation of Welch's Grape Juice return movements to Colorado, you have had an inbound movement of sugar to Welch's Grape Juice to Springdale?

A. No.

Q. That's primarily the movement of—

A. (Interrupting) No.

Q. Where could your vehicles come from to go to Springdale?

A. Most of them originate at that time to points of southwestern Missouri, or eastern Oklahoma, and other points in Oklahoma.

Q. You said you transported in a year about five million pounds of can goods?

A. Six or seven million pounds.

Q. Six or seven million over the entire year?

A. Yes, sir.

Q. Do you have extensive operating authority, Mr. [fol. 380] Rogers, with Wright Motor Lines, and it involves transportation of commodities other than canned goods, do you not?

A. That's true.

Q. What proportion of your business is related to this five or six—six or seven million pounds of canned goods?

A. I couldn't hardly name—what percentage, do you mean?

Q. Yes.

A. I just wouldn't know.

Q. When you gave your pieces of equipment, were you including your equipment which you used for the petroleum product?

A. Yes, sir.

Q. That includes the equipment that you use in the transportation in bulk?

A. Yes, sir.

Q. Would you handle canned goods in any vehicles that you transported petroleum products in bulk?

A. No.

Q. It wouldn't be a very good practice, would it?

A. No.

Q. Tell me how many pieces are pieces of equipment involved in the transportation of the petroleum products?

A. Six tractors and six trailers.

Q. Now, how many pieces of this equipment that you have are pieces of equipment that have mechanical refrigeration on it?

A. We only have one that has mechanical refrigeration, [fol. 361] Q. And some of them, you must have some that have insulation?

A. We have several insulated, yes.

Q. Well, do you use this one trailer that has mechanical refrigeration for the movement of frozen grape juice from Welch?

A. Yes.

Q. And that would be among the pieces of equipment that you would have in Arkansas, because it's satisfactory for the movement of that product?

A. That's true.

Q. Has your business been increasing, the business of Wright Motor Lines been increasing?

A. Yes.

Q. Has it been profitable?

A. Yes.

Q. You made a profit in 1957?

A. Yes, sir.

Q. You made a profit thus far in 1958?

A. Yes, sir.

Q. During 1957, did you transport any commodities from Steele Canning Company?

A. No, sir.

Q. Did you transport any from Keystone Packing Company?

A. No, sir.

Q. Did you transport any from Cain Canning Company?

A. No, sir.

[fol. 362] Q. Did you do so in 1958?

A. No, sir.

Mr. Layne: I think that's all I have, thank you.

Exam. Hanback: Any redirect?

Mr. Jones: No, sir.

Exam. Hanback: You are excused.

(Witness excused.)

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CARROL LOVING was sworn and testified as follows:

Direct examination.

By Mr. Jones:

Q. State your name and address.

A. Carroll Loving, 4515 North Miller Boulevard.

Q. Are you connected with a motor carrier?

A. Yes, sir.

Q. What carrier?

A. Loving's Truck Lines.

Q. That is a corporation?

A. Originally it was incorporated, yes, sir.

Q. That was a successor of Loving Truck Lines?

A. Yes, sir.

Q. And what is your position with the company?

A. I am president.

Q. How long have you been connected with that company?

A. Twenty-five years.

Q. You have been operating it through that period of time?

[fol. 363] A. Yes, sir.

Q. Has your company been issued a certificate by the Interstate Commerce Commission?

A. Yes, sir.

Mr. Jones: May I have an identification number assigned at this time.

Exam. Hanback: It will be marked Exhibit 16.

(Protestant's Exhibit No. 16, Witness Loving, was marked for identification.)

By Mr. Jones:

Q. I note that the document is issued to a Loving Truck Company. Was this prior to the time that you incorporated?

A. Yes.

Q. And give the correct name and business name now.

A. It is now Loving Truck Lines.

Q. And will you examine what has been identified as Exhibit No. 16, and you say that it is a true and correct excerpt taken from your certificate?

A. Yes, sir.

Q. And is that a true and correct reflection of the authority which you have from the Commission?

A. Yes, sir.

Q. Have you prepared a customer list?

A. Yes, sir.

Mr. Jones: May I have an identification number assigned?

[fol. 364] Exam. Hanback: Document will be marked Protestant's Exhibit No. 17 for identification.

(Protestant's Exhibit No. 17, Witness Loving, was marked for identification.)

By Mr. Jones:

Q. Would you examine what has been identified as Exhibit No. 17 and state if that is a list of the equipment of Loving Truck Lines?

A. Yes.

Q. Should there be any amendment, provisions, or alterations?

A. There should be two tractors, additional tractors, and five additional trailers. The trailers were picking up, dispatching, and I didn't have the papers or serial numbers on there and the tractors I didn't have any serial numbers on.

Q. Those are purchased trailers and tractors?

A. They are in the process of being delivered to us at any time.

Q. Now, on the equipment shown on Exhibit 17, is it all company owned?



A. Company owned, all of the trailers and roughly half of the tractors, and the other tractors are leased.

Q. Under what type of lease?

A. Long-termed lease; most of the boys have been with us for the past 10 or 12 years.

Q. Where does your company have offices, terminals, or any such facilities?

[fol. 365] A. Our home office is in Oklahoma City, and we have an office in Denver, Colorado.

Q. Did you hear the testimony of Mr. Rogers of Wright Motor Lines?

A. Yes, sir.

Q. And does your company handle dispatching in the same manner as described by Mr. Rogers?

A. Yes, I think so.

Q. Well, will you describe it?

A. Well, we are both carriers, and we do not operate any regular schedule, but we do have an office in Oklahoma City and an office in Denver. We have teletypes between offices that we keep in contact, have counseling pertaining to Oklahoma City. Other than that, our drivers call us long distance for our dispatch, whatever point they are.

Q. Now, concerning the trailers as shown on Exhibit 17, and additional trailers which your company is now taking possession of, what type are they?

A. Well, they are all tandems, they vary in length from 34 feet to 38 feet. I think mostly everything is 38 feet now. Some are fly closed vans, I think probably one of them are open top vans. I mean the sides are roughly six, eight, or [fol. 366] seven feet and they have tarp top. Some of them are insulated vans and the walls and the top are insulated. There is no mechanical refrigeration on any of them.

Q. Now, does your company haul canned goods?

A. Yes, sir.

Q. To what extent?

A. I judge we haul 400,000 pounds a month, I believe there may be a little bit more.

Q. And has your company been hauling canned goods during the five years of operation?

A. Yes, sir.

Q. You had considerable experience in the transportation of canned goods?

A. Yes.

Q. Now, are you opposing this application in part?

A. Yes, sir.

Q. Will you state to what extent?

A. To the extent from all of nine points of origin mentioned in the application, points in Oklahoma; Kansas on or south of 50 and 50 north; to that portion of New Mexico on or north of 85.

Q. Seven, isn't it?

A. Yes, and on that portion on Highway 75 and 87.

Q. Will you point out portions of that authority as shown in Exhibit 16 whereby you render such service?

[fol. 367] A. Well, I don't know where to start. We have general commodities between Oklahoma City and a 10-mile radius of Oklahoma City on one hand and all points in Arkansas, all points in Kansas, and to all other points in Oklahoma, to points in Missouri. That part is the radial operation. And we also have a radial out of Texas and similar counties and Oklahoma to any point in Colorado or east of Highway 75 and 87 and to any point in Kansas on or south of 50 and 50 north to any point in New Mexico on or north and east of Highway 87. Did I miss any?

Q. I believe not. Did you hear the testimony of Mr. Wright between the interline of your company and his?

A. Mr. Rogers?

Q. Yes.

A. Yes.

Q. Have you discussed that with Mr. Rogers?

A. Yes, some.

Q. And is that agreeable with your company, I mean would you perform that service in connection with—

A. (Interrupting) If it was anything that we could not handle over our own lines from original destination then we would be interested; if it was anything that we could handle we would handle it.

Q. Naturally, I am thinking of one of the shipments to go to a point in Colorado, west of U. S. 87, which would be [fol. 368] beyond your authority.

A. It could be handled, yes.

Q. Have you served the Steele Canning Company at Springdale?

A. I don't recall that we ever did from Springdale.

Q. Have you attempted to secure such business?

A. Not at recent years, no, sir. Mr. Jones, if I—at one time before we had this, we used to pick up shipments the shipper would deliver to us over to, I believe, Westville, Oklahoma, over the line from Arkansas, and it seems to me it was Steele Canning Company, and I might check on it, but I can't be positive.

Q. You have hauled canned goods from Westville, Oklahoma?

A. Yes, sir, and from Fort Smith and—

Q. Have you hauled canned goods from Springdale to any other company?

A. Yes, we haul for Welch.

Q. Do you have equipment in that area?

A. Yes, sir, we have equipment in Tulsa, I guess, every day.

Q. How far is Tulsa from Springdale?

A. About 300 miles.

Q. How long would it take you to move that equipment?

A. About three, four hours, three hours I should judge.

Q. Are you ready, able, and willing to perform service within the territory which you have mentioned here for Steele Canning Company or Cain Canning Company or Keystone Packing Company or any other company that [fol. 369] might desire your services?

A. Yes, sir.

Q. Have you offered in connection with your irregular operations, drop-off shipments?

A. Yes, sir.

Q. Multiple deliveries or whatever you might call it, is that a regular part of your operation?

A. Yes, sir.

Q. And do you perform that for other can companies?

A. Yes, sir.

Q. Have you been able to take care of your customers in the production of canned goods?

A. Yes, sir.

Q. Has your business in the transportation of canned goods increased throughout the years?

A. Our business has increased all through the years, I couldn't say definitely, but our business as a whole has increased, yes.

Q. Now, are there any commodities on the return movement to these four origin points which had become destination points then, which your company has protested?

A. Yes, the return movement, we haul sugar out of Colorado, and we have authority, we could haul fibreboard boxes if there is a movement in that direction. And I think we could handle any of their shipments insofar as the origin points, insofar as the destinations that have become the origin points and parts of Oklahoma.

[fol. 370] Q. By tacking all through points of Oklahoma, that is right?

A. Yes, sir.

Q. And between Oklahoma City and points within 20 miles thereof and on the other points handled in Arkansas?

A. Yes, sir.

Q. And then could you transport any commodities in Colorado, subject to territory exceptions not involved, here from any point on east or to all points in Arkansas?

A. Yes, sir.

Q. And likewise to Westville, Oklahoma?

A. Yes, sir.

Q. You can handle a movement of canned shoestring potatoes, I believe was from Colorado Springs to Springdale?

A. Yes, sir.

Q. Would your company be glad to handle that?

A. We would be glad to handle anything.

Q. And would your company handle any of the commodities mentioned by the witnesses here including the labels and the boxes or tin cans that originated in your territory?

A. We would, yes, sir.

Q. Do you need the business which was involved in this application?

A. We are always looking for business, yes, sir.

Q. What is your opinion as to whether or not you can

[fol. 371] give a satisfactory service if you were permitted to handle it?

A. I think we could take care of it, in fact, I know we could.

#### OFFERS IN EVIDENCE

Mr. Jones: I offer Exhibits 16 and 17.

Exam. Hanback: Any objection?

Mr. Layne: No.

Exam. Hanback: Exhibits 16 and 17 received in evidence.

(Protestant's Exhibits Nos. 16 and 17, Witness Loving, were received in evidence.)

#### Cross examination.

By Mr. Layne:

Q. Miss Loving, I didn't quite understand your relationship with the Wright Motor Line and your statement that you had discussed it with them. Is it correct that you have discussed an interline or interchange arrangement with them?

A. We have discussed interlines and interchange arrangements, I think since during the last war. In fact, at that time I leased quite a few trucks one way.

Mr. Jones: Are you speaking of the world war, now?

The Witness: World war. I think that I leased Wright's trucks one way and they leased me the other way, but we like to haul all the freight that we can get. If we can get anything that belongs to Wright where we like it that much better, and I think we feel the same way, and I say we are competitors and anything that we can handle over our own lines we would not interline with them. Anything that we cannot handle over our own lines, if we can work out an [fol. 372] arrangement with anyone, then we will try to do so, but first and foremost, we try to handle as far as we can on our own line, or if we can handle it on a singleline movement that is all right, or with whoever we could.

**Exam. Hanback:** Off the record.

(Discussion off the record.)

**Exam. Hanback:** On the record.

**By Mr. Layne:**

**Q.** I know, I realize that what you just said, I am sure you would make interline arrangements with any line in the United States would be satisfactory.

**A.** With who?

**Q.** With you and the shipper.

**A.** Yes, I imagine we would.

**Q.** Now, I wanted you to tell me though, how you were going to handle with the Wright Motor Line a couple of shipments. Now, tell me about a shipment that originates at Springdale, Lowell, and Westville, Oklahoma, that has a drop east of 87 and one west of 87, now who gets what part of that, tell me about how you divide that revenue?

**Mr. Jones:** You mean drops in Colorado?

**Mr. Layne:** Yes, east and west of 87.

**The Witness:** I don't think we got as far as the discussion about revenue. We unload quite a number in Tulsa, Oklahoma, Muskogee, Oklahoma. It was said that if such a [fol. 373] shipment were offered, our Loving could take a percentage of the truck at Tulsa and pick up at the origin point down to Muskogee, I transport it to Wright and our—but, as I say, if it were a shipment that we could handle to its destination, we would not interline.

**By Mr. Layne:**

**Q.** Well, I am interested in this half of this you could handle and half of it you could not.

**A.** I imagine it would depend upon the circumstances at the particular time, it could be given to us at Muskogee, we could deliver what we could and interline the rest of it.

**Q.** Now, as a matter of fact, that would give you the longer haul?

**A.** Yes, I have the idea that is probably what we would do unless we do have a number of trucks to end up at Tulsa, and we load a number of trucks at Muskogee and if it would



come about and go ahead and make up our pickup on the other shipments.

Q. And if it came about it would come about because of the operations of shipments in your company?

A. I imagine that is right, that's right.

Q. And really it would depend upon the flow of your traffic whether you had a truck in Tulsa, whether the truck was empty, whether you had—all of those factors would be a factor as to how to handle the particular shipment?

A. Yes, I think that would be true.

[fol. 374] Q. And in order to prevent shorthauling yourself of the things being equal, all of the factors being equal, you might take that shipment to Denver yourself and drop part of it and then interline it with some other carrier?

A. That would be, yes.

Q. So that the way as a common carrier, the way in which your shipments are handled depends upon the flow of traffic over your line, isn't that right?

A. Yes, I would say so.

Q. And whether you have a truck available in Tulsa or whether you don't have a truck available in Tulsa is always determined, isn't that right?

A. Yes, if we don't have trucks in Tulsa, we have them in Oklahoma City, which is 88 miles further.

Q. And if they are not either in Tulsa or Oklahoma City, they are at some other point dictated by the movement of the traffic over your line, isn't that right?

A. Yes, sir.

Q. And that traffic that dictates the movement of flow of your equipment and the service is the traffic that comes to you from a substantial number of shippers?

A. Yes.

Q. You would not gear the entire operation of your company to perform a service for Steele Canning Company, would you?

A. I don't think it would be the entire operation.

[fol. 375] Q. Miss Loving, the service that you would perform for Steele or which you could perform for Steele would be dictated by the service demands made on you

by a number of other shippers other than Steele, isn't that right?

A. No.

Q. You do not think so?

A. I am not quite sure I get your meaning.

Q. I see.

A. Well, if you mean, could I give Steele personal service, yes, sir, I do, and I could take care of their service which I am authorized. To Steele we are comparatively small company, and we have grown each year, and I believe that is because we do so than the larger corporation, I don't think that we could give personal service.

Q. Well, your company has made a profit?

A. I think so, I hope so, we have shown an increase so far as our growth.

Q. Your company has grown steadily?

A. Yes, sir.

Q. It's grown in 1957 and 1958?

A. I think so, yes, sir.

Q. Do you handle any of the transportation of Steele Canning Company of '57 and '58?

A. No, I don't think so.

Q. I understand, too, that is why you were at this hearing, [fol. 376] I gathered that. Now, could you tell me how you would handle a shipment that originated in—well, as a matter of fact, you could not handle a shipment—how would you handle a shipment that involved a drop at some point en route that you could not serve?

Mr. Jones: Object to that. Just a moment, Carrol. I object to that unless counsel is specific as to what points.

By Mr. Layne:

Q. Let's originate a shipment at Lowell and Fort Smith, Arkansas, and take it to—involving a drop to a point in Kansas on and north of U. S. Highway 50, with a further drop then, in Colorado, on and east of Highway 87, and the final drop west of 87.

Mr. Jones: I object to that question, there is—

Exam. Hanback (interrupting): Objection overruled.

The Witness: It would depend where your point is or Kansas or we do pick it up, interline your Kansas portion from the point on our route that would be nearer to your destination at Kansas, deliver to a portion of Colorado, east of 87 and interline a portion that went west of 87.

By Mr. Layne:

Q. Would you provide truckload drop-off service and rates on that shipment then?

A. We have truckload rates.

Q. I mean on that particular shipment, what would the case be?

A. I am not quite sure. Your shipment that goes beyond our line would probably have to go on their local [fol. 377] rate from wherever to the destination in Kansas.

Q. Well, do you call that shipment, that movement I just gave you a truckload service with drop-off?

A. Frankly, I don't know what you would call it. It seems to me that you requested about drop-off shipment, and over our own line we handle them every day or many times a day, and if you are going to pick up points, then, in the territory that we are not authorized to serve, I don't see how we could. When part of it is within our territory and part of it is not, but within the area that we are familiar with, sure, we could make pickup and make deliveries and make stop-offs.

Q. All I am trying to get at is, once you get a drop or combination of shipments beyond this particular defined territory in Kansas and Colorado, there is no longer a drop service by you, is it?

A. I still haven't got it straight what you mean by a drop service. If it is within our territory and we are permitted to serve that territory, we will deliver it, if not, we will interline it to the closest point.

Q. Thank you, I think that answers that particular question. All right, now, tell me, is any of this city equipment?

A. Yes.

Q. On Exhibit 17?

A. Yes.

Q. Which are the pickups that are identified there?

[fol. 378] A. Fifty-nine and sixty-one.

Q. And how about the trailer, do you have any city trailer?

A. We have one trailer that we keep in Oklahoma City, it is not on this list. All of the rest of them are. Our business is primarily a truckload loaded on the trailer and delivered on the trailer.

**Redirect examination.**

**By Mr. Jones:**

Q. Mr. Turnbow this morning stated that on October 3rd he called you relative to two loads into Iowa, and Illinois, do you recollect that?

A. Yes, sir.

Q. And at that time he stated that you suggested or discussed a routing with Buckingham via Denver, that is true?

A. Either I misunderstood him or he misunderstood me. Mr. Turnbow called and he said he had two truckloads going to Iowa and Illinois points, and he wanted a truck at 1:00 the next Monday, and I think Mr. McNary and I answered the phone and he asked me to take the call. I told him that we did not serve Iowa and Illinois, and he said that he got the idea from—I don't know whether there has been any reference or some record in this connection with this hearing that we can handle it in connection with Buckingham, and I thought he said out of Denver, but I wanted to know the rate and the stopover charge and the transit time. So I asked him would he give me 30 minutes to an hour, and I got on the teletype and got Buckingham's rate and their running [fol. 379] time, and I did, and I also checked the rates from Springdale to these destinations in Illinois and Iowa, and, frankly, going out of Springdale by way of Kansas City and destination, why, it was, I think, a little more than a third than I think it would be to ship it clear out to Denver and back again. So I called him and told him the rate of Buckingham and the stopover charge and the

minimum and the approximate delivery times and in all fairness I thought I would tell him there are lines that are going out of Springdale and there are carriers out here that would make all of these places and the rate would be far less than it was shipping around the other way. I believe he said he would have to do further checking on that, and in the conversation I tried to tell him something about our service and that into Colorado and the little portion we have in New Mexico, and then to western and south and western Kansas points that we could give him very good service and that we would like to have the business, but I didn't think it would be fair to him to pick up this shipment and take it around because he said it would have been to Wednesday without waiting. We would have been delighted to get the freight, but it seems difficult to me to ship it clear around. We want all the business that we can handle and handle properly, but I don't think that would have been fair to the customer.

**Q.** Any discussion that you had at that time instead of Denver?

**A.** No.

[fol. 359] **Q.** Is there any reason why you did not mention that to him?

**A.** I am not sure I know they are in Denver because these are beyond, and I am not really right sure that I knew he came into Kansas City, I am sorry but I did.

**Q.** And what was his response to your solicitation of freight into Colorado, Kansas, and New Mexico?

**A.** He said he had nothing at that particular time and inquired what our rates and minimums were, and I gave it to him. And I think he said to the best of his knowledge he had a couple of loads in Colorado this past year, but he would keep it in mind and that was, I think, all that was said.

**Exam. Hanback:** Any recess?

**Mr. Layne:** I have a few questions.

**Recross examination.**

**By Mr. Layne:**

**Q.** Now, are you quite sure that Mr. Turnbow told you that he only had two loads into Colorado in the past year?

**A.** Yes, sir.

**Q.** You are positive of that, your recollection is quite clear?

**A.** Well, I was making notes all the time I was talking to him, I don't think I understood him to say that he offered me a couple of loads. He said he thought possibly they—and something about his company not being—I don't know—territory or it being your territory or something.

**Q.** Now, did you know that a protest had been filed in [fol. 381] your name that said you had service and would provide service to Steele Canning Company in conjunction with Buckingham?

**A.** Yes, sir, I think so.

**Q.** And did you know that you had done that and such a protest had been filed in your name and presented to the Interstate Commerce Commission at the time you were talking to Mr. Turnbow?

**A.** Yes.

**Q.** And did you not suggest to Mr. Turnbow in conjunction with that movement that your line in conjunction with Buckingham would handle those movements?

**A.** That our line in conjunction with Buckingham would handle the movement?

**Q.** Yes, through Kansas City.

**A.** Kansas City was not mentioned.

**Q.** You did not mention Kansas City?

**A.** As I say, I know that we interlined some freight with Buckingham into Denver.

**Q.** When did you next interline?

**A.** I don't think we did because I didn't think Buckingham came into Kansas City.

**Q.** Didn't you realize that a protest had been filed in your name saying that you had service through Kansas City in conjunction with Buckingham?



Mr. Jones: I object to that, that the protest stated that. That was a possible method of performing service [fol. 382] for Steele Canning Company, and then there was no statement made in there that there had been any such operations conducted in the past.

Exam. Hanback: Did you read the protest?

The Witness: I skimmed through it.

By Mr. Layne:

Q. Well, did you?

A. Yea.

Q. It didn't register?

A. No.

Q. And when he had this problem and asked you to solve it, you didn't suggest your truck line at all, did you?

A. No, sir, I didn't.

Q. Now, did you refer to your operation to Kansas to Mr. Turnbow, or did you talk to him in connection only with Colorado points?

A. I talked to him mainly in connection with Colorado. I specifically remember mentioning New Mexico and whether I mentioned the portion of Kansas I do not remember. I think the reason that I didn't suggest his bringing it into Kansas City, we are not in a midwestern tariff and we would have been a combination of vehicles, and he said that the rate would be competitive with the local carrier, and I did—in fact, I even called Kansas City on another teletype to find out who could handle it directly into Kansas City, and the rate in comparison, and we would have delighted to have the shipment and it would have cost a great deal more money.

Q. I understand, but your line is not and does not and [fol. 383] has not handled shipments out of Arkansas via Kansas City into Illinois, North Dakota, or Nebraska, in conjunction with Buckingham, has it?

A. It hasn't.

Mr. Layne: That is all.

Exam. Hanback: Witness excused.

(Witness excused.)

Mr. Eyster: Be excused from the hearing?

Exam. Hanback: Very well.

We will take a short recess.

(Short recess.)

Exam. Hanback: The hearing is resumed.

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BILL D. PAYNE was sworn and testified as follows:

Direct examination.

By Mr. Jones:

Q. State your name and address.

A. Bill D. Payne, 4248 Locust, Kansas City, Missouri.

Q. What is your occupation?

A. I am a sales representative for Buckingham, Inc.

Q. How long have you held that position?

A. For approximately two years.

Q. In that connection, is it necessary for you to familiarize yourself with the authority and with the equipment?

A. Yes, sir.

Q. Is there such a thing known as the Buckingham Freight System?

[fol. 384] A. Yes.

Q. What is that?

A. Buckingham Freight System is composed of Buckingham Express, Inc., Buckingham Transfer, Inc., Buckingham Transportation, Inc., and Buckingham Transportation, Inc., operator of Des Moines Transportation, Buckingham Freight Lines Ltd. I believe that is all of them.

Q. Now, do you in your sales work solicit freight over the combined lines over the Buckingham Freight System?

A. Yes.

Q. And that includes Buckingham Freight and Transfer?

A. Yes.

Q. And is it necessary for you to become acquainted to the equipment of Buckingham Express and Transfer?

A. Yes.

Mr. Jones: Mr. Examiner, I have distributed copies of Buckingham Transportation, Inc.

**Exam. Hanback:** I have three documents, which one?

**Mr. Jones:** The next, I believe, is Buckingham Transfer. I would like an identification number for that, and the last one is Buckingham Express.

(Protestant's Exhibits Nos. 18, 19, and 20, Witness Payne, were marked for identification.)

**By Mr. Jones:**

**Q.** Will you examine what has been identified as Exhibit 18, and state to the best of your knowledge if that is a true [fol. 385] and correct copy issued to Buckingham Transportation, IM & C?

**A.** It is.

**Q.** And 19, is the same true as to the Buckingham Transfer?

**A.** Yes.

**Q.** And No. 20 as to Buckingham Express?

**A.** Yes.

**Q.** Now, your company is protesting this application in part, is it not?

**A.** Yes.

**Q.** Will you state where your interest and your transportation on these commodities would begin?

**A.** Our interest would lie in the traffic moving to points in the states of Nebraska, Iowa, Illinois, Minnesota, North Dakota, South Dakota, primarily, and any other traffic that might perhaps be moving into Wyoming, Montana, and Colorado.

**Q.** Now, where would Buckingham first pick up the traffic?

**A.** Kansas City, Missouri.

**Q.** And by what company?

**A.** Buckingham Express, Inc.

**Q.** And will you show on Exhibit No. 20 the authority which they would have to—pardon me, Exhibit No. 19.

**A.** Well, No. 20 is the Buckingham Express, and it covers our authority operating between Kansas City and Princeton, Missouri, over Highway 69.

[fol. 386] **Q.** Does that cover counties in Atcheson County, Missouri?

**A.** Yes.

Q. All right. Now, if you go to Exhibit 19.

A. No. 19 is the Buckingham Transfer authority which includes an irregular route authority covering general commodities moving between points in Atchison County, Missouri, and that part of Nodaway County, Missouri, north of Missouri Highway 4 and west of U. S. Highway 71, including points in the indicated portions of the highway specified on the one hand and on the other points in Illinois, Iowa, Nebraska, and Kansas.

Q. And that would be the authority under which your company would operate an irregular route delivery service to those states that you just mentioned?

A. Yes.

Q. And does your company perform that type of a service?

A. Yes.

Q. And does it offer a multiple delivery service?

A. It does, it is used constantly.

Q. Now, as to the Dakotas, what would be the next step to get transportation?

A. Into the Dakotas we operate primarily in the western part of South Dakota.

Q. Well, what company?

A. That would be the Buckingham Transportation.

Q. And where would they pick up the traffic?

[fol. 387] A. Either at Omaha, or Des Moines, Iowa.

Q. And does Buckingham Transportation go to the Twin Cities and North Dakota?

A. Yes.

Q. And westerly into both South Dakota and North Dakota?

A. We do.

Q. And is that shown under Sub No. 2 of the Buckingham Transportation Exhibit No. 18?

A. Yes, it is.

Mr. Jones: You didn't mind if I refer to some of the docket numbers?

Mr. Joyce: No.

By Mr. Jones:

Q. And under Docket Sub No. 66, does Buckingham have authority between the Twin Cities and the various points on regular routes in the State of North Dakota?

A. Yes.

Q. And under Docket Sub No. 69, does Buckingham have irregular authority between all points in North Dakota, other than a small part in the southeastern corner of the state?

A. Yes, that's correct.

Q. And also under Sub 2, does it have authority to points over routes comprising practically all the highways west of the Mississippi—pardon me, Missouri River in the State of South Dakota?

A. Yes.

[fol. 388] Q. Now, how would your company reflect deliveries to points in eastern South Dakota?

A. We would interchange that traffic either at Omaha, Nebraska, or Sioux City, Iowa, with Wilson Truck Lines.

Q. At Sioux Falls, South Dakota?

A. Sioux Falls, yes.

Q. Now, is your company engaged in handling canned goods?

A. Yes.

Q. Extensively?

A. I don't think that we primarily specialize in handling canned goods as such, we handle a considerable volume of canned goods as a part of the goods that we do handle.

Q. And does your company handle empty tin cans and boxes, that type of freight?

A. Yes, we do.

Q. Does your company handle sugar?

A. Yes.

Q. Does your company handle sugar to unloading points?

A. Yes, we do.

Q. You heard the testimony in these proceedings, have you not?

A. I have.

Q. And so far as any commodities that you have mentioned, is your company ready, able, and willing to perform service to shippers of any of those commodities?

A. Yes, we are.

[fol. 389] Q. Now, with what companies would you interline between the origin points and Kansas City, Missouri?

A. We could interline with any of the carriers that operate between those points that the shipper would care to use, Arkansas Best, Jones Truck Line, England Brothers, Frisco, any—Campbell 66.

Q. And are you, in fact, interlining with those carriers presently?

A. Yes, there is a constant flow of traffic going between those carriers and the company.

Q. Does your company do that as an ordinary regular part of service?

A. We do.

Q. And does your company need all the business it could get?

A. Certainly.

Q. To anticipate counsel, I will ask you if your company had a profit last year?

A. To the best of my knowledge, yes.

Q. The year before?

A. Yes.

Q. I think you are wrong.

A. Could be, you know more about it than I do. We are hoping for one this year, let's put it that way.

#### OFFERS IN EVIDENCE

Mr. Jones: I offer Exhibits Nos. 18, 19, and 20.

Exam. Hanback: No objection?

[fol. 390] (No response.)

Exam. Hanback: Received in evidence.

(Protestant's Exhibits Nos. 18, 19, and 20, Witness Payne, were received in evidence.)

#### Cross examination.

By Mr. Layne:

Q. Tell me the last time you interchanged with trailer, Arkansas Best to Kansas City?



A. I would say within the last two weeks.

Q. Don't say, tell me. Do you know?

A. I can't tell you the exact date.

Q. Tell me what—did you have interchange agreements with these carriers?

A. Yes, sir.

Q. Did you participate in them?

A. No.

Q. Do you know the terms of them?

A. No.

Q. Do you know anything about whether the interchange had agreements with trade in the entire territory here?

A. Which territory?

Q. Your territory, the one that you described.

A. So far as I know, yes.

Q. Do you know or are you just thinking they generally do?

A. I have no reason to think otherwise.

Q. But that's because you think that that is generally [fol. 391] the case with respect to your company?

A. I never have seen a trailer interchange refused or a limitation put on the disposition of a trailer on our line.

Q. Well, that is not normally one of your functions, is it?

A. No.

Q. As a matter of fact, you don't have any duties or responsibilities with respect to that type of decision in your company, do you?

A. Not normally, however, when we opened our office in Kansas City, I was the first representative of the company in there, and I did have somewhat activity in the formation of how our operation is set up there.

Q. Are you now an officer of the Buckingham with respect to relationship with other carriers?

A. No.

Q. Tell me what was the last shipment of canned goods you moved in conjunction with any carrier of the State of Arkansas, any point through Kansas City?

A. There again, if you refer to my previous testimony we handle both large and small shipments of canned goods and any other general commodity all the time.

Q. I understand most general commodity carriers do and they have large terminal facilities and there are all kinds of freight moving generally over their system. Tell me, when was the last time that your company through [fol. 392] Kansas City handled a shipment of canned goods from any point in Arkansas, to one of the territories that you are talking about?

A. I am unable to give you an answer.

Q. Tell me, can you tell me—if you can't tell me that, can you tell me any specific instances in which your company participated in any carrier in interchanging carriers that were loaded with canned goods from Arkansas to any territory?

A. No.

Q. Can you tell me what points there are can originated in any of your territory going to Arkansas?

A. Omaha, Nebraska.

Q. Omaha, Nebraska. There is a can factory at Omaha?

A. Yes.

Q. Any other?

A. Not that I can recall.

Q. Did you ever handle any shipments originating in Omaha, Nebraska, going to Arkansas?

A. No, not to my knowledge.

Q. Does Buckingham or any of the Buckingham companies to which—you are representing them all, aren't you?

A. Yes.

Q. Have any of the Buckingham companies transported anything for Steele Canning Company?

A. No.

Q. Cain Canning Company?

[fol. 393] A. No.

Q. Keystone Packing Company?

A. Not to my knowledge.

Q. What carrier would originate the shipment for you at Westville, Oklahoma, if I had a shipment at Westville, could you know?

A. That would depend on the shipper.

Q. Now, I understand that it would depend on the shipper.

A. That's the shipper's choice, not ours.

Q. Actually, you are talking about a service from Kansas City, Missouri, aren't you?

A. Yes, sir.

Mr. Layne: Thank you very much.

Exam. Hanback: Witness excused.

(Witness excused.)

Mr. Jones: Mr. Examiner, I ask permission to be excused.

Exam. Hanback: Very well.

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JOSEPH E. McNAMARA was sworn and testified as follows:

Direct examination.

By Mr. Bazelon:

Q. Will you state your name?

A. Joseph E. McNamara, 400 East Armour, Kansas City, Missouri.

Q. What is your occupation?

A. Traffic manager.

Q. By whom are you employed?

[fol. 394] A. Watson Brothers Company.

Q. How long have you been with the company?

A. Seven years.

Q. Is it necessary in your job that you be thoroughly familiar with your operation and the service?

A. Yes, sir.

Q. Is Watson Brothers Transportation Company a common carrier of general commodities?

A. Yes.

Mr. Bazelon: May I have marked for identification the certificate of Watson Brothers?

Exam. Hanback: It will be marked Exhibit No. 21.

Mr. Bazelon: May I at the same time have marked for identification a map of the Watson Brothers Company?

Exam. Hanback: Marked 22 for identification.

(Protestant's Exhibits Nos. 21, and 22, Witness McNamara, were marked for identification.)

Mr. Bazelon: May I have marked for identification the terminal list of Watson Brothers?

Exam. Hanback: Marked 23 for identification.

(Protestant's Exhibit No. 23, Witness McNamara, was marked for identification.)

Mr. Bazelon: And may I have marked for identification this document of the Watson Brothers Company?

Exam. Hanback: It will be marked Exhibit 24 for identification.

[fol. 395] By Mr. Bazelon:

Q. I show you what has been marked Exhibit No. 21 for identification and ask if that is a true and correct copy of the certificate issued to your company by the Interstate Commerce Commission.

A. It is.

Q. I show you what has been marked Exhibit 22 for identification and ask if that is a map which in a general way attempts to portray the operations of the Watson Brothers Company.

A. Yes.

Q. It's a general map of it?

A. Right.

Q. Now, you are familiar with the scope of this application, is that correct?

A. Yes.

Q. Now, insofar as this application is concerned, it's true, is it not, that your company does not have authority to serve the origin points in Oklahoma, and Arkansas, direct, is that correct?

A. Yes.

Q. Any service that you might provide would be on an interchanged basis out of Kansas City or Missouri, is that correct?

A. That's correct.

Q. Now, what is it that your company is authorized to serve, which are involved in this application?

A. Arizona, California, Colorado, Iowa, Minnesota, Nebraska, [fol. 396] braska, New Mexico, authority in Kansas, I believe.

Q. How about the Twin Cities of Minneapolis and St. Paul?

A. Right.

Q. Now, you do not serve those states on an irregular route basis, it's on a regular route basis, is that correct?

A. Yes, regular route.

Q. Now, how many pieces of equipment does your company have, roughly?

A. Oh, roughly, two thousand.

Q. I show you what has been marked Exhibit No. 23 and ask you to tell us what that is.

A. That is a list of the terminals on Watson Brothers System.

Q. Is it otherwise self-explanatory?

A. Yes.

Q. I show you what has been marked as Exhibit No. 24 for identification and ask you to tell us what that instrument is.

A. That's a list of the straight trucks, tractors, and trailers owned and/or leased by Watson Brothers.

Q. By leased, is that on a long-term basis?

A. Yes, it is.

Q. And I notice there are approximately 1578 trailers. Are all or practically all of these trailers suitable for the handling of canned goods?

A. Yes, they are.

Q. Now, does your company provide a multiple drop-off service?

[fol. 397] A. Yes, they do.

Q. Is that a common part of your operation?

A. It's common, yes, according to tariff regulations, yes.

Q. And you do perform it, is that correct?

A. Yes, I do.

Q. Now, does your company interchange traffic at Kansas City and St. Louis?

A. Yes, they do.

Q. What percentage of your company's operations con-

sist of your—strike that. What percentage of the Kansas City and St. Louis traffic is interchanged traffic?

A. Kansas City, approximately 65 per cent; St. Louis, 70 to 75 per cent.

Q. Now, is this interchange when in connection with truckload traffic normally done on a two-trailer basis?

A. Yes.

Q. What are some of the companies that could originate traffic involved in this application to be brought to your company at Kansas City or St. Louis?

A. Carriers that we can connect with are Arkansas Best, Campbell 68, England Brothers, Jones Truck Line, Frisco Transportation Company, Missouri-Arkansas Transportation Company, that's about it.

Q. Now, does your company presently interline or interchange traffic with those carriers at Kansas City or St. Louis?

[fol. 396] A. Yes.

Q. Is that a common occurrence?

A. Very common.

Q. Now, simply on the movement of supplies inbound into the Arkansas and Oklahoma territory from points such as California, and New Mexico, Arizona, and others involved in this application, is your company in a position to provide that service through the Kansas City and St. Louis gateways?

A. Yes, they are.

Q. Is that desirable traffic?

A. Yes, it is.

Q. And is the canned goods movement involved in this application desirable traffic?

A. Yes.

Q. Does your company presently transport canned goods?

A. Yes, they do.

Q. Have you had any difficulty in moving that product?

A. Not to my knowledge.

Q. Does your company need the traffic that's involved in this application?

A. Yes, they do.



Q. Need all of the traffic you can get, is that right?

A. Right.

### Overs in Evidence

Mr. Hanson: That's all I have. I offer in evidence Exhibits 21 through 24 inclusive.

[fol. 309] Exam. Hanson: Any objection?

Mr. Layne: No objection.

Exam. Hanson: Received in evidence.

(Protestant's Exhibits Nos. 21 through 24, Witness Mc-Namara, were received in evidence.)

### Cross examination.

By Mr. Layne:

Q. Did I understand you to say that 60 per cent of your traffic is received from other carriers?

A. No, I said 60 per cent of our traffic at Kansas City is on an interchanged basis, not necessarily a trailer interchange.

Q. Well, you mean on an interline basis, don't you?

A. Interline, yes.

Q. Well, an interline isn't the same thing, is it?

A. That depends on what you are talking about.

Q. In any case, this is traffic shipments of all kinds that is received at your terminal?

A. Right.

Q. That you deliver to other freight lines, and that has nothing to do with necessarily trailer interchange?

A. No.

Q. And when you also used the word "interchange" at St. Louis, you meant interline-received movements from other carriers?

A. Right.

Q. Or tendered shipments?

A. Right.

[fol. 409] Q. When was the last time you interchanged with one of the carriers that you mentioned at Kansas City or St. Louis providing several drops in this territory?

A. I probably couldn't say of canned goods, I don't pay too much attention to the commodities.

Q. Well, can you tell me?

A. No, I couldn't tell you.

Q. What was the last time that you provided a full drop—a five-drop service in Minnesota and North and South Dakota?

Mr. Bazelon: Well, they don't serve North and South Dakota, they only serve the Twin Cities.

By Mr. Layne:

Q. Let's take a couple of the states that you used. You referred to the State of Nebraska?

A. Right.

Q. Iowa?

A. Right.

Q. When was the last time you interchanged a trailer with any carrier coming from any place and provided four or five drop-offs, some in the State of Iowa, and some in the State of Nebraska, and wound up in Minneapolis?

A. Of canned goods?

Q. Yes.

A. I can't recall any.

Q. You don't recall seeing any?

A. No.

[fol. 401] Q. And how about in St. Louis?

A. I couldn't say for St. Louis.

Q. Well, what's the last time that you dropped off five drops of canned goods in Nebraska, Iowa, and Minnesota?

A. That we received in Kansas City?

Q. Anyplace.

A. Anyplace, I couldn't say that.

Q. As a matter of fact, you tell me whether it's the policy of Watson Brothers Transportation Company to oppose each and every application?

Mr. Bazelon: Objection, irrelevant and argumentative.

Mr. Layne: I don't think I have anything further. Thank you very much.

Exam. Hanback: You are excused.

(Witness excused.)

Mr. Bazelon: Mr. Examiner, I have an airplane to catch—

Exam. Hanback: You may be excused.

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J. KEITH FRASER WAS SWORN AND TESTIFIED AS FOLLOWS:

Direct examination.

By Mr. Ashton:

Q. Will you state your name.

A. My name is J. Keith Fraser. I reside at 211 West Elm, Springfield, Missouri, and I am employed by the Frisco Transportation Company of Springfield, Missouri, as a general freight and passenger agent.

[fol. 402] Q. How long have you been with the company?

A. Going on 12 years.

Q. And what did you do before that time?

A. I was chief radio man, not for the preceding one year, I have been in motor carrier transportation since 1923.

Mr. Ashton: I would like to have three exhibits marked for identification. Certificate of Public Convenience and Necessity.

Exam. Hanback: Certificate is marked Exhibit 25 for identification.

(Protestant's Exhibit No. 25, Witness Fraser, was marked for identification.)

By Mr. Ashton:

Q. Mr. Fraser, will you please refer to what has been marked Exhibit No. 25 and tell us what that is.

A. Exhibit No. 25 is a Certificate of Convenience and Necessity, No. 89913, issued to Frisco Transportation Company to operate as a common carrier by motor vehicle.

Q. Does that show all the authority of the company?

A. It does.

**Q. Mr. Fraser, who owns the Frisco Transportation Company?**

**A. It's a wholly owned subsidiary of the Frisco Railroad Company.**

**Mr. Ashton:** The second document to be marked as an exhibit is a map, and the third is a document showing points served by Frisco Transportation Company.

**Exam. Hanback:** They will be identified as Exhibits Nos. [fol. 403] 26 and 27.

(Protestant's Exhibits Nos. 26 and 27, Witness Fraser, were marked for identification.)

**By Mr. Ashton:**

**Q. Mr. Fraser, I hand you what has been marked Exhibit No. 26. Will you please tell us what that is?**

**A. Exhibit No. 26 is a map showing the routes over which the Frisco Transportation Company operates.**

**Q. Will you explain Exhibit 27?**

**A. Exhibit No. 27 is a list of the points that are served direct by the Frisco Transportation Company in several of the states mentioned in the application.**

**Q. All right, sir, are you familiar with the authority sought in this case?**

**A. Yes, sir.**

**Q. What points in Exhibit No. 27 are served directly by the Frisco that are included in Applicant's Exhibit No. 3?**

**A. The points served direct by the Frisco Transportation Company total in number 16, and that includes the origins of the Springdale and Lowell, and the others are Gradville, Arkansas; Jonesboro, Arkansas, Ada and Durant, Oklahoma; Ardmore, Oklahoma; Kansas City, Kansas; and in Mississippi, Amory, Columbus, New Albany, Tupelo; and in Missouri, Rolla, Bolivar, Clinton, Lebanon, and St. James, and Springfield, Missouri.**

**Q. How about Texas?**

**A. Texas, they have eliminated Dallas.**

[fol. 404] **Q. How about Denison?**

**A. We do serve Denison, Texas.**

**Q. Does the FTC serve any of the other points included in Applicant's Exhibit No. 3?**

A. The other points would have to be served interline traffic.

Q. What equipment does it operate?

A. Well, the Frisco Transportation Company operates approximately 124 tractors, both gasoline and diesel, and approximately 245 trailers.

Q. Does the Frisco Transportation Company have an agent at or near either Springdale or Lowell, Arkansas?

A. We have an exclusive agent at Rogers, Arkansas, and we have a joint agent, rail and trail, at Flintville.

Q. How far is Fayetteville from Springdale?

A. About eight miles.

Q. Where is the other agent?

A. Our exclusive agent is at Rogers, Arkansas.

Q. How far is that?

A. Oh, I would say less than twenty.

Q. Do the tariffs published by the Frisco Transportation Company to which Frisco Transportation Company is a party cover shipments with drop-off privileges?

A. Yes, they do from all of the origins. They are rates published by the Middlewest Motor Freight Bureau, and we participate in both single and joint line application.

[fol. 405] Q. What kind of service would the Frisco Transportation Company perform that are involved in this application?

A. For direct points it would be the next morning or at least before noon the next day on so far distant points.

Q. Could the Frisco Transportation Company work out some means of assisting the canning companies in that distribution problems?

A. Oh, I believe we could.

Q. How?

A. Well, we could find out their destinations and set up rates in specific commodity rates and the various tariffs that would be applicable to provide rates with stop-off privileges and with partial unloading, of course, with a stop-off charge for that privilege.

Q. Has such a service been worked out with interline carriers for other shippers?

A. Yes, we have.

Q. How is that working out?

A. Very satisfactorily.

Q. Have you been asked to work out such a service to any of the canning companies involved in this application?

A. Personally, I have not been asked.

Q. But your company has been asked?

A. I couldn't say whether our sales department has been asked to work out something like that or not, and if they [fol. 406] had been, I would say that I would be one of the first to know it.

Q. What equipment would be available for such a service?

A. Well, we have several units that are not being used and, in fact, we could have available any number of equipment or units up to hundred forty-five complete units for that service that was needed.

Q. I take it you have idle equipment?

A. Yes, we do, and some others.

Q. Is the traffic involved in this application desirable as of the FTC's?

A. Yes, it is.

Q. Do you have anything else to add?

A. No, I believe not, except that we do operate schedules into that territory and many of them are returning lightly loaded.

Q. Do you need this traffic then, to balance out the loads?

A. Yes, sir.

#### OFFERS IN EVIDENCE

Mr. Ashton: I would like to offer Exhibits Nos. 25, 26, and 27 in evidence.

Exam. Hanback: Any objection?

(No response.)

Exam. Hanback: Will be received in evidence.

(Protestant's Exhibits Nos. 25, 26, and 27, Witness Fraser, were received in evidence.)



## Cross examination.

By Mr. Layne:

Q. How would working out a drop-off shipment help [fol. 407] your lightly loaded vehicles?

A. Well, we could load on the lightly loaded vehicles portions of shipments that were offered.

Q. And this would be under some sort of joint shipment, and then you take some and put it on a lightly loaded vehicle?

A. Yes.

Q. And you would provide drop-off charges for that?

A. Yes, we could, because you see when it was loaded, they would both work through the same terminal, it would be loaded—

Q. (Interrupting) You mean loaded again on an original trailer?

A. No, not on the original but the one that had the original portion of the shipment on it.

Q. So what would be necessary for you to work this in would be divide it up, that is what you are referring to?

A. That would occur once in a while.

Q. If the two would happen to hit at the same time. Ordinarily, it would be loaded in an available empty unit, that wouldn't help?

A. No, not at those instances.

Q. Now, how would you handle the shipment that Mr. Turnbow referred to from Ada, Oklahoma, to Wichita Falls, Texas, Vernon, Texas, Memphis, Texas, and Lebanon, Texas?

A. We would handle the shipments direct to Dallas, dropping off at Ada and interline with Dallas.

Q. And what if you had to come back with it to some [fol. 408] of these points, why, you would come back, is that it?

A. Well, we wouldn't because Dallas would be our point.

Q. I see. Well, how about if you put another one of those points in there and shipment went like this. Suppose the shipment which originated at one of the points and then went to Ada, Oklahoma, Denison, Texas, Wichita Falls, Texas, Memphis, and Lebanon?

A. The same way.

Q. You would take it to Dallas?

A. No, we would drop off at Ada and tender—

Q. (Interrupting) And when you interchange it, would you expect the other carrier to take your trailer?

A. Yes, if that would be more practical thing to do.

Q. Would that be true if there were only 5,000 pounds of can goods in it?

A. No.

Q. They would rehandle it across their dock or maybe rehandle once or twice?

A. Yes, but this possibility could exist if we have enough freight going to the part that could—we might interchange the whole trailer with the other traffic on it.

Q. That's the point. The point is the service that you would be able to perform, would be like the other common carriers, would depend upon the volume of the shipment that you had, not only from Steele Canning Company or [fol. 409] from Cain or Keystone but from other shipments?

A. That's right, and each one of them—each instance would have to stand on its own feet depending upon what actually was available at that particular time.

Q. And that would be true, with how soon you could pick up the load and point of origin, and how soon you could deliver it would depend upon the flow of traffic over your route?

A. Yes.

Q. Tell me, you said you were going to be able to work out a solution for these people. How would you work out a solution on a drop that would encompass a truckload or a movement on that shipment I just gave you where you dropped off at Ada, dropped off at Denison, and you wound up with 8,000 pounds in Fort Worth, 3,000 pounds of which were going to Wichita Falls, Texas, and the remaining 5,000 pounds which were going to Lubbock, Texas?

A. Well, we deliver to Ada, Denison, and Fort Worth, and interline the balance of the carriers serving—

Q. And that would have nothing at that point, it would not any longer be a truckload shipment?

A. If you had 8,000 pounds, it would be possible.

Q. But it would no longer be a truckload with a drop-off?

A. No, it would move at the truckload rate at the destination or the highest rate of point.

Q. I understand that. Now, tell me, could you handle [fol. 410] any shipments for Steele Canning Company where the shipment had to originate where the commodities involved—necessary for them to originate at Springdale, at Fort Smith?

A. We can handle to Springdale direct but Fort Smith would have to be interlined with the carrier, probably, at Springdale.

Q. It wouldn't be possible for you to make up a consolidated truckload at those two origin points, would it?

A. Well, we could at Springdale or at Rogers but the Fort Smith would have to be delivered to us at one of those points.

Q. Well; if it went the other way, you would have to deliver to somebody else, wouldn't you?

A. No, your principle would be in the same.

Q. Can you—would the situation with the same on the limitation of your service so far as Westville, Oklahoma, is concerned?

A. Yes, sir, we don't serve them.

Mr. Layne: That's all I have.

Exam. Hanback: Any redirect examination?

(No response.)

Exam. Hanback: You are excused.

Mr. Ashton: Thank you.

(Witness excused.)

Exam. Hanback: We will recess to 9:00 a.m., October 21, at this place.

(Whereupon, an adjournment was taken until 9:00 a.m., Tuesday, October 21, 1958.)

[fol. 411]

BEFORE THE INTERSTATE COMMERCE COMMISSION  
Docket No. MC-117391

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In the Matter of:  
E. L. REDDISH  
Springdale, Arkansas  
Contract Carrier—Irrregular Routes

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Transcript of Hearing of October 21, 1938

Cambridge Room,  
New Hotel Pickwick,  
Kansas City, Missouri.

Met, pursuant to adjournment, at 9:30 a.m.

Before:

H. L. HANBACK, Examiner.

APPEARANCES:

(As heretofore noted.)

[fol. 413]

PROCEEDINGS

Exam. Hanback: Hearing is resumed.  
Call your next witness.

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W. H. KURRY was sworn and testified as follows:

Direct examination.

By Mr. Durden:

Q. State your name, please, sir.

A. W. H. Kurry.

Q. And with what firm are you connected?

A. I am with the Arkansas Best Freight System, Inc., Fort Smith, Arkansas, as a Vice-President of traffic.

Q. Vice-President of traffic. Now, Mr. Kurry, is Arkansas Best Freight System, Inc. the successor to the Motor Freight Line, Inc.?

A. Yes, sir.

Mr. Durden: May I have this exhibit marked?

Exam. Hanback: It will be Protestant's Exhibit No. 28.

(Protestant's Exhibit No. 28, Witness Kurry, was marked for identification.)

By Mr. Durden:

Q. Please refer to that as Exhibit 28, and state whether that is a copy of the Arkansas Motor Freight Lines, Inc., MC-29910 and Sub.?

A. It is a Certificate of Public Convenience and Necessity.

Q. Shown as the Arkansas Motor Freight Lines, Inc., is that correct?

[fol. 414] A. That is correct.

Q. But the name has been changed, is that correct?

A. Yes, sir.

Q. Is your company presently operating under this authority?

A. We are.

Q. Daily service?

A. Yes, sir, we offer a daily regular route service.

Q. For general commodities?

A. Yes, sir.

Mr. Durden: I ask that this exhibit be marked.

Exam. Hanback: It will be Protestant's Exhibit No. 29.

(Protestant's Exhibit No. 29, Witness Kurry, was marked for identification.)

By Mr. Durden:

Q. Mr. Kurry, please refer to the Exhibit No. 29, and state what that is, please, sir.

A. That is a map of the operations of the Arkansas

Best Freight System, Inc., showing the states and principal points in which we serve generally on the south, San Antonio, Houston, Dallas, and Fort Worth, on the north, Chicago, Toledo, Cleveland, Columbus, Dayton, with points in Indiana, Missouri, Arkansas, and also serving Memphis and Shreveport, as well as Kansas City, Missouri.

Q. Shreveport, Louisiana, is the only point you serve in Louisiana?

A. and Bossier City.

[fol. 415] Q. And in Tennessee, Memphis only, is that correct?

A. That is correct.

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

Mr. Durden: May I have this marked, please?

Exam. Hanback: It will be Exhibit No. 30.

(Protestant's Exhibit No. 30, Witness Kurry, was marked for identification.)

By Mr. Durden:

Q. Refer to that which has been identified as Exhibit No. 30, and state what that is, please.

A. Exhibit No. 30 is a statement of numbers of tractors, trailers, pick-ups, and delivery trucks, owned and operated by Arkansas Best Freight System, Inc.

Q. What is the total number shown on that, please?

A. Shows 948 total pieces of equipment.

Q. And what was the date of that exhibit?

A. May 16, 1958.

Q. Has that number of pieces changed since then?

A. Not appreciably, there has been some changes, replaces, but it is practically the same.

Q. Same as today?

A. The number would be upward as there has been a few trailers purchased since May 16.

Mr. Durden: May I have this marked as Exhibit 31, please?



[fol. 416] (Protestant's Exhibit No. 31, Witness Kurry, was marked for identification.)

By Mr. Durden:

Q. Please refer to Exhibit No. 31, and state what that is, please, sir.

A. This is a point list used in sales purposes from our company showing the territory served direct by Arkansas Best Freight System, and the points authorized to serve direct, and also shows information in regard to locations of terminals and other truck information.

Q. Showing the points served, the states that you are authorized to serve, and where your terminals are located, is that correct?

A. Correct.

Q. Are you familiar with the application here in the hearing of E. L. Boddish?

A. Yes, sir.

Q. Mr. Kurry, how would your company handle freight destined for points beyond Dallas, Texas, and west of Kansas City, what method would you use to deliver merchandise which might be offered to you, or freight offered to you by either Keystone Packing Company or Keystone Canning Company, first, beyond west of Dallas, how would you handle that type of shipment?

A. We have two gateways which we would interline freight point west from Dallas, use either Kansas City in connection with Joliet and Western or we would use [fol. 417] Texasiana in connection with Texas carriers, such as those Texas Red Ball direct, east Texas, strictly southwestern use Red Ball.

Q. Interline at Texasiana, you say, with Texas carrier?

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

By Mr. Durden:

Q. Mr. Kurry, do you presently interline or interchange with Watson Brothers?

A. Yes, we do have interchange with Watson in Kansas City or St. Louis freight with Watson through Kansas City is destined the Central-Western states.

Q. And are you familiar with Buckingham Freight System, there are several Buckingham organizations, Buckingham Transportation, freight?

A. Yes, we do some business with Buckingham through Kansas City.

Q. For what state do you interline or interchange?

A. I must say I don't know their interline territory, although it interlines with Colorado through Kansas City.

Q. Colorado?

A. Yes, Colorado would be one of them.

Q. Mr. Kurry, this application of Mr. Reddish is for outbound canned goods out of Springdale, Lowell, Fort Smith, and Westville. Except for the Westville, Oklahoma, location, does your company have authority to serve the [fol. 418] other points as points of origin?

A. May I have those points repeated?

Q. Springdale, Lowell, and Fort Smith.

A. Yes.

Q. And are you presently operating out of those points?

A. Yes, sir.

Q. And is your company ready, willing, and able to accept any freight that might be offered to it by shippers at those points?

A. Yes, sir.

Q. Steele Canning Company, McCain, and Keystone Packing Company?

A. Yes, sir.

Q. Does your company maintain an organization or a department that regularly solicits freight from potential shippers?

A. Yes, we have a rather large sales department in its own rights, we have a general sales manager, we have a vice-president of sales, and we have in the neighborhood of 50 salesmen at this time, and they are located a few

at each of the smaller terminals, and a few more at the larger terminals, spread over the entire city.

Q. Is your company interested in handling both the out-bound shipment of canned goods and the inbound shipment of the other commodities listed on this application?

A. Yes, sir.

Mr. Durden: You may cross-examine.

[fol. 419] Cross examination.

By Mr. Layne:

Q. Mr. Kurry, I noticed on your Exhibit No. 31, on the second page, a statement in the second column in heavy black type, that there are some points in Arkansas to which you limit your service, for example, to volume movements of 20,000 pounds or more?

A. That is true, that is the way we solicit that particular type of traffic.

Q. That is not a limitation in your operation authority?

A. No, sir, it is not. It is merely to make a more efficient operation where there are smaller non-union carriers serving some of these little points that we handle more efficiently.

Q. These are the smaller points within the sales?

A. Right.

Q. And your service, you feel, was more efficient on the 20,000 pound shipments than on the smaller shipments?

A. That is right.

Q. So far as your interchange or interline services is concerned with various carriers you tender freight to and receive freight from, a large number of carriers, do you not, at all of your gateway points?

A. Yes, sir, I think any carrier would operate under those gateways.

Q. And you generally do not have any restrictions in your tariff in receiving freight from or delivering freight [fol. 420] to any other common carrier serving common points, isn't that correct?

A. No, we have no restrictions that I know of.

Q. Now so the record may be quite clear, it would not

be possible for Arkansas Best Freight to pick up a load where the pick-up points were Fort Smith, Arkansas, and Westville, Oklahoma?

A. No, we could not pick up at Westville, Oklahoma, on our own run.

Q. And so if a shipment involved pickups at both of those points of origin, you could not originate the shipment?

A. No, we could not originate anything other than the points on our own line.

Q. Now also tell me, so far as your service into Texas is concerned, is that a service by which, under your operating authority, you go to Kansas City and then back to Texas?

A. Well, in a strict sense of the word, it would be an interline service over Kansas City, because we do not serve between Arkansas and Texas.

Q. You do not, so that actually in order to get into any of the Texas or southwestern points, you would have to interline at Kansas City?

A. Kansas City or Texarkana on the south end.

Q. Now you said with respect to Buckingham, that you were sure that you had sometime or other handled freight in conjunction with Buckingham. Do you recall now any instance in which a trailer of Buckingham was on the system of Arkansas Best Freight?

[fol. 421] A. Specifically I cannot say that they were on our line because well, we handled some truckload movements with them, I don't know whether the equipment came on through or not.

Q. How about your trailers on their line?

A. In evidence of the record, I cannot say that we do.

Q. Now as a matter of fact, doesn't Arkansas Best Freight have another series of words for A.B.F. that you use as a sales slogan? Don't you use as a sales slogan, "After Better Freight"?

A. Well, that is put on some stationery, every year it changes, that is one of our slogans.

Q. Is it one of your current slogans?

A. Yes.

Q. And whether freight is better freight or not depends

on the amount of revenue that returns and whether it fits into your operation and helps balance your operation isn't that right, Mr. Kurry?

A. That would be obvious that it would be.

Q. As a traffic director of Arkansas Best Freight you are familiar with the tariffs and the tariff participation shown on the Exhibit No. 3, page 3, of Arkansas Best?

A. Yes, sir.

Q. As a matter of fact the tariff and rate department of Arkansas Best Freight is under your supervision, is it not, Mr. Kurry?

A. Yes, sir.

[fol. 422] Q. Isn't it a fact, Mr. Kurry, that canned goods is one of the lowest revenue-producing items for a common carrier?

A. Well, in many cases it would be; there are some places where the shippers have not been accorded low commodity rates, which would make it a high rate of traffic.

Q. Generally speaking, isn't it true that canned goods are all on low commodity rate?

A. Yes, sir.

Mr. Layne: I think that is all I have. Thank you.

#### OFFERS IN EVIDENCE

Mr. Durden: I offer Exhibits 28, 29, 30, and 31 to be received in evidence.

Exam. Hanback: Protestant's Exhibits Nos. 28 through 31, inclusive, will be received in evidence.

(Protestant's Exhibits Nos. 28 through 31, inclusive, Witness Kurry, were received in evidence.)

Exam. Hanback: Call the next witness.

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W. C. EMERSON was sworn and testified as follows:

Direct examination.

By Mr. Ryan:

Q. Would you state your name and address for the record?



A. W. C. Emerson, 526 Mission Street, San Francisco, California.

Q. By whom are you employed?

A. Western Pacific Railroad Company.

[fol. 423] Q. In what capacity?

A. Transportation inspector.

Q. How long have you been with Western Pacific?

A. Thirty years and two months.

Q. What are your duties at this time?

A. My duties are generally to assist the general superintendent of transportation and general manager, various duties as they see fit to direct me, and one of which is appearing before the regulatory bodies in protest against applications for extensions or of motor carrier rights.

Q. Do you have access to your company's records?

A. Yes, I do.

Q. Did you prepare an exhibit, or was an exhibit prepared under your direction for use at this particular hearing?

A. Yes, it was, everything except the maps and the various forms that are general information in our company.

Q. And you are familiar with the general scope of this application?

A. Yes, sir.

Mr. Ryan: May this document be given the next Exhibit number?

Exam. Hanback: That will be Exhibit No. 32 for identification.

(Protestant's Exhibit No. 32, Witness Emerson, was marked for identification.)

[fol. 424] By Mr. Ryan:

Q. Mr. Emerson, would you have any remarks to make concerning this exhibit?

A. Well, I think in the main it's self-explanatory, however, I will go through the parts.

The part A is the map of our system, showing the general detailed link of our position in the western three



states, California, Nebraska, and Utah. It also shows our connections with other carriers that serve other parts of the state, or states, in our network throughout the United States, to give transcontinental service from and to points in various states.

The part B is a chart showing our schedules that we set forth as our manifested trains and the service that we operate under. This, in addition to the train shown and the various schedules, we run additional trains as the traffic warrants.

Part C is a list of our ownership of automotive power, both for the Western Pacific and our two solely-owned subsidiaries. The latter two lines serve the agricultural area of California.

Part D is a list of our equipment ownership.

Part E shows the ownership of refrigerator equipment which is owned by us but leased to the Pacific Fruit Express Company.

Part F is a six-page list showing all of the stations that are served by the Western Pacific in our subsidiary lines.

Part G is a statement setting forth the traffic that originated in California and destined to the States of Arkansas and Oklahoma. This particular statement was worked up [fol. 425] prior to the time of the amendment which stipulated that by the applicant, which stipulated that the traffic that he desires to haul is only directly to the three mentioned canners.

Part H is a statement showing the position in the various forms of revenue earned, that is, where it rates in rank, and as you can see under Item 2, which is "Food products in cans and packages", under I.C.C. Item 763 classification, it shows that the revenue on canned goods is a tremendously well-positioned item and that comes to the sum of 10.53 per cent of our total revenue. The 20 items listed are the 20 major items of a great many items in the transportation, so it does have an—and our loading generally are about 21,000 cars, or 696,000 tons, plus.

Item I is a statement showing the net railway operating income and the average net investment, and the portion of rate return, and, as you can see, the statement shows a

diminishing factor all along, which is one of the things that the railroads must do today, and that is to retain every bit of traffic with increase cost.

Part J is a little draw-off showing approximately where we put our money, and that we constantly must spend in the millions of dollars every year to maintain our properties; we are just one of the many railroads that are doing the same thing.

Q. Your railroad then considers canned goods to be [fol. 426] valuable traffic?

A. Yes.

Q. In any direction, east or west?

A. Right.

Q. Does your railroad provide drop-off service?

A. Yes.

Q. Would you explain that a little bit?

A. Well, we have the stop privilege to complete loading, stop to part unload, it's all provided in the tariff. There is a charge for a stop-off privilege, but we also provide specially equipped cars so that the shipper can allow a portion to be taken out of the car without disturbing the balance of the load, they can segregate it in any fashion he wants.

Q. Do you know whether other railroads provide similar service?

A. Many of them are, yes.

#### OFFER IN EVIDENCE

Mr. Ryan: I would like to offer Exhibit 32 in evidence.

Exam. Hanback: It will be received in evidence.

(Protestant's Exhibit No. 32, Witness Emerson, was received in evidence.)

#### Cross examination.

By Mr. Layne:

Q. Could you take this shipment for me and tell me how it would be handled over the lines of railroads connecting with yours and how long it would take to handle it, and what the shipper would do under the circumstances I will

give you, and the receivers. I would like to originate this [fol. 427] at Springdale, Arkansas, and at Westville, Oklahoma, and say that 50-50.

A. Well, to start with, I would need a map to start with. Do you have a Rand-McNally to see where the towns are? Unfortunately I don't—I am not personally familiar with the two towns and the relation to north and south or east and west in line of traffic.

Q. I see, well let's—

A. (Interrupting) Well go ahead and I will try it.

Q. I want you to tell me, we are going, it's necessary to pick up at both points?

A. Yes, sir.

Q. And the shippers or receivers of this, the consignees, are going to receive some that was originated at both Springdale and at Westville, Oklahoma?

A. Yes, sir.

Q. And we are going to drop off this at Liberal, Kansas, and we are also going to make a drop-off shipment at Denver, Colorado,—

A. (Interrupting) Yes.

Q. (Continuing) —and we will make two drop-offs in San Francisco area, one in Oakland and one in—

Mr. Jones: I would like to object. Really in a direction you don't possibly have such a shipment to your own witnesses.

If you will look at your Exhibit 6, I believe it is, you will see that every time they have drop offs they are within [fol. 428] 200 or 300 miles upon one another. We talk about Liberal, Kansas, the same as of California.

By Mr. Layne:

Q. Take out San Francisco. You serve Denver?

A. No.

Q. Well, take out either of those two points.

A. That's all right, it could be either one.

Q. You do have drop-off service?

A. Sure.

Q. Let's make another drop off in California, forget Kansas and Colorado.

A. All right.

Q. Now, and one of the consignees has no rail siding?

A. That's right.

Q. Now how long would it take, do you think, for that shipment over the line of railroad to get to those three consignees?

A. Well, in the case of your first stop-off you are going to pick up at Liberal, Kansas.

Q. Pick up at Springdale.

A. Springdale.

Q. And go to Westville, Oklahoma. How long would that take on a railroad?

A. Not being familiar with the line that serving I wouldn't want to state what it would be, I couldn't even guess because I am not familiar with the railroad.

Q. You would not be able to tell me?

[fol. 429] A. No, not on that particular move.

Q. That might, do you think in your judgment, would take as much as two days?

A. Not necessarily does, I don't know the territory, it might only take 23 hours.

Q. Well, in any case—

A. (Interrupting) It might be within a switching limit, I don't know.

Q. Well, how long would it take for a shipment that was dropped off in Stockton, California, to a shipper that had no rail siding, and a delivery being made in Oakland, and another being made in San Francisco, how long would that take?

A. Well, it would take the stop at Stockton would be depended upon how soon the man came after his freight, whether he came at 7:00 a.m., or 8:00 a.m., or 11:00 a.m., he would have to unload it; it would take him probably three hours if he used one man or four men, and it would take us 12 hours to get the car from the time of release to the time it was spotted at the next point.

Q. And then the hours after that?

A. It would depend on our service across the Bay a little bit, it could be 24 to 36 hours.

Q. Across the Bay?

A. In the transit time depending upon how long it took the man to release the car.

[fol. 430] Q. And in order to give that kind of service as to those three drop-off points, it would be necessary for the receiver to pick it up at the particular time that the car was spotted there in order that the next scheduled train coming through would be able to pick it up?

A. Yes, sir.

Q. And that would be dependent upon your train schedule?

A. Right.

Q. And if that didn't suit the receiver, he wanted to receive it at a different hour of the day, it would have to wait until the next day?

A. To the next scheduled train. That is done on an ordinary course, doing business with all shippers as receiving, it's common knowledge with their traffic man, they know exactly how the railroads can serve them.

Q. And would you say, sir, that's all common knowledge, for example, with canned goods?

A. That's right. I worked with the canning companies, I am claim prevention officer and for six years I have worked directly with the can company, so I know all of their operations and I know more of their failures than they know of.

Mr. Layne: Thank you very much.

Exam. Hanback: Any more questions?

(No response.)

Exam. Hanback: Witness is excused.

[fol. 431] (Witness excused.)

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LAWRENCE FULWILER was sworn and testified as follows:

Direct examination.

By Mr. Ryan:

Q. Would you state your name and address for the record?

A. Lawrence Fulwiler.

Q. By whom are you employed?

A. The Denver & Rio Grande Western Railroad Company.

Q. How long have you worked for them.

A. Since April, 1923.

Q. In what capacity are you employed?

A. Supervisor of merchandise service.

Q. What are your duties in connection with that position?

A. Well, expediting service, handling at various points.

Q. All right. Do you have any obligations with respect to Interstate Commerce Commission?

A. Yes, I have been assigned by my company to appear at these hearings and have done so for many years.

Q. Are you familiar with the scope of the E. L. Reddish application?

A. Yes, sir.

Mr. Ryan: I ask that this map be given the next exhibit number and marked for identification.

[fol. 432] (Protestant's Exhibit No. 33, Witness Fulwiler, was marked for identification.)

Mr. Ryan: I ask that this summary be marked for identification.

(Protestant's Exhibit No. 34, Witness Fulwiler, was marked for identification.)

By Mr. Ryan:

Q. Would you describe Exhibit No. 33 for us again?

A. Exhibit No. 33 is a map showing the line of our railroad throughout Colorado, Utah, and New Mexico, and also shows the various connecting railroads that are eastern and western terminals.

Q. Would you describe Exhibit No. 34?

A. Exhibit 34 is a summary of all of our freight and passenger and maintenance equipment.

Q. Has your railroad the ability, in your estimation, to handle canned goods in connection with other railroads?

A. Yes, we do, and we handle a large volume of this



traffic, in fact, it amounts to 2.600 per cent of our total freight tonnage on which its revenue is \$4,450,692, or 5.42 per cent of our total freight revenue during the year 1957. As of the source of this data is 1957 report to the I.C.C. form Q C S, so you can see that it is important traffic to your company which is largely a bridge carrier with other railroad companies.

[fol. 433] Q. Does your railroad provide drop-off service?

A. Yes, we do, it's the same as all railroads.

#### OFFERS IN EVIDENCE

Mr. Ryan: I would like to offer Exhibits 33 and 34 to be received in evidence.

Exam. Hanback: They will be received in evidence.

(Protestant's Exhibits Nos. 33 and 34, Witness Fulwiler, were received in evidence.)

Exam. Hanback: You may cross-examine.

Mr. Layne: I have no questions.

Exam. Hanback: Witness is excused.

(Witness excused.)

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

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O'NEAL FULLER was sworn and testified as follows:

Mr. Matthews: I have some exhibits I would like to have marked. The first is entitled, "General office facilities", to be marked for identification as Exhibit No. 35.

(Protestant's Exhibit No. 35, Witness Fuller, was marked for identification.)

Mr. Matthews: The second is a map, Exhibit 36, to be marked for identification.

(Protestant's Exhibit No. 36, Witness Fuller, was marked for identification.)

[fol. 434] Direct examination.

By Mr. Matthews:

Q. Would you please state your name?

A. O'Neal Fuller.

Q. Where do you live, Mr. Fuller?

A. 623 North Washington Street, Dallas, Texas.

Q. By whom are you employed?

A. East Texas Motor Freight Lines, Inc.

Q. What is your capacity?

A. Vice-President of traffic.

Q. Are you familiar with the operations of the freight lines?

A. I am.

Q. Will you please refer to what has been marked as Exhibit 35, and state what that is?

A. That generally is a description of the general office facilities in each of our terminal facilities and each of the company-operated terminals on our system, pointing out the number of personnel in each of the terminals and the type of equipment, type of communications.

Q. Do you have a terminal at Texarkana?

A. We do.

Q. Is that described on page 14 of this exhibit?

A. That is correct.

Q. Is the Texarkana terminal set up to handle interchange shipments with other carriers?

A. Yes.

[fol. 435] Q. Would you describe that terminal a little bit on what is shown on page 14?

A. It is about our four larger terminals; it originally was a key relay point in our operation and was later, due to some union problems, we arranged a more expeditious relay form to Little Rock by arranging for our runs from Dallas, Texas, to Little Rock, relaying these to Texarkana Terminal. It still is a sizable installation where freight is normally interchanged to and from connecting carriers daily.

Q. While we are on that point, are you generally familiar with the application which is to the points involved and that sort of thing?

A. I am.

Q. And do you understand that the origin points of canned goods, as far as the application is concerned, from Springdale and Westville, Arkansas?

A. That is correct.

Q. Now, insofar as those points can be served by Arkansas Best Freight System, do you presently interchange shipments between that system with Texarkana?

A. We do now.

Q. There is nothing unusual about that operation?

A. Not at all.

Q. Would you refer to what has been marked as Exhibit No. 36, and state what that is?

[fol. 436] A. That is a route map of our operation which geographically portrays the approximate routes our company operates and the states in which we operate, in addition thereto there is a list of points to which our company offers daily direct service, both l.t.l. and truckload.

Q. Now by connection from Texarkana this makes it possible to serve a large number of points in East Texas, such as Houston, San Antonio, and so on?

A. We now do so, yes.

Q. Now what about movement to and from points north of Springdale, Lowell, Fort Smith, and Westville? Would you be able to interchange with other carriers at a point such as Little Rock for those movements?

A. We could.

Q. What about St. Louis, could you interchange at that point?

A. We could.

Q. Would you specify carriers with whom you could interchange shipments to and from the north?

A. Arkansas Best, Campbell's 66, England Brothers, Frisco Transportation—

Q. (Interrupting) Do you work with Jones Truck Lines?

A. (Continuing) —and Jones Truck Lines.

Q. Where would you interchange with Jones?

A. Little Rock or St. Louis.

Q. Would you be able to interchange with Jones on [fol. 437] shipments moving to and from the south, in other words, points in Texas?

A. Little Rock or Dallas, Texas.

Q. That is something that you normally do in your everyday business?

A. We do.

Mr. Matthews: I would like to have this marked for identification.

Exam. Hanback: It will be Exhibit No. 37.

(Protestant's Exhibit No. 37, Witness Fuller, was marked for identification.)

By Mr. Matthews:

Q. Would you please refer to what has been marked for identification as Exhibit 37, and state what that is?

A. That is a complete list of the vehicles owned and operated by East Texas Motor Freight Lines, Inc., as of July 10, 1958.

Q. Are those vehicles being operated at the present time?

A. They are not.

Mr. Matthews: I would like to have Exhibit No. 38 marked for identification.

(Protestant's Exhibit No. 38, Witness Fuller, was marked for identification.)

By Mr. Matthews:

Q. Would you refer to what has been marked for identification as Exhibit No. 38, and state what that is?

A. That is our Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission and all of our current Sub numbers.

[fol. 438] Q. Are Exhibits 35 through 38 true and correct to the best of your knowledge?

A. They are.

Q. Mr. Fuller, is anything undesirable so far as your company is concerned about the transportation of canned goods?

A. Not at all.

Q. And by that I mean canned goods by this application.

A. Desirable traffic.

Q. What about the transportation?

A. It is desirable traffic.

Q. Are you handling such traffic at the present time?

A. We are.

Q. Who for?

A. Continental Can Company from St. Louis, move to Dallas, Fort Worth, Midland, Odessa, San Antonio, Houston, Port Arthur, Texas, and Willis Point.

Q. Are those substantial movements?

A. They all move at l.t.l. quantities except the l.t.l. quantity of 2,500 pounds nearly completely fills my trailer body, we mix at l.t.l. traffic heavy loading freight to make a more profitable occupation.

Q. At any rate you are not doing any such thing?

A. We are not.

Q. What about caustic soda, do you have any transporting of that?

[fol. 439] A. Yes, considerable move on that.

Q. Who for?

A. Diamond Truck Company on products namely from Houston to points north of Houston, that being one of the producing points for caustic soda, as well as for a company near Corpus Christi, Southern Elk Line.

Q. Do you ever transport salt?

A. Very little, it's mostly transported by common carrier from where the salt is manufactured.

Q. There is nothing about salt that would prevent you?

A. No, we are ready, willing, and able.

Q. Would the same generally apply to sugar?

A. We are now hauling sugar.

Q. You are?

A. Yes, sir.

Q. Who for?

A. A. E. Daily Manufacturing Company, both in liquid, bulk, in air-tank trucks, as well as dry, in bags and sacks.

Q. Do you operate daily schedules all over your routes?

A. We do.

Q. So if one of the supporting shipments should need a load of cans delivered from a point, say, in Illinois, on your routes, would you be in a position to give, say,

overnight service in that load of cans, or what would the service be?

A. We have regular service, what we prefer to call our [fol. 440] "policy service" between key terminals, as, for example, from Chicago to Dallas on l.t.l. traffic, or for that matter, Dallas to Chicago, our selling policy of service is third morning delivery and the same would be true of generally all points in Texas, except San Antonio, on the one hand, and Chicago on the other, and San Antonio service is for the morning, and from St. Louis to Memphis and Texas points including San Antonio, our service is second morning to and from. Generally all of our other points are overnight.

Q. Now you have equipment dispatched over your entire system at all times, don't you?

A. We do.

Q. In other words, it is not necessary for you to take a truck from, say, Little Rock, and send it empty all the way up to Chicago to get cans, you have a truck up there, don't you?

A. We have one from Little Rock to Chicago.

Q. And you have trucks at the north end of the line ready to come back at all times?

A. That's right.

Q. Does your company at the present time participate in commodity rates covering movement of canned goods?

A. We do.

Q. Supporting shippers of Steele Canning Company, Keystone Packing Company, and the McCain Canning Company, do you recall any of those companies ever filing [fol. 441] any complaint action against your company insofar as your rates are concerned?

A. No, sir, not at all.

Mr. Matthews: You may cross examine.

Cross examination.

By Mr. Layne:

Q. Look at your Exhibit No. 36, on the third page you have certain points in your operating authority to which



you restrict operation of and the volume of shipments that you handle direct.

A. Yes, sir, we do.

Q. Why do you do that?

A. We have some union difficulty that the union was forcing us to open another terminal at all points and put in a number of union personnel which would make it definitely and distinctly a very profitable operation, so we elected to not service to points to say, away from the union proper but to interline the smaller shipments and service at stop-offs, as long as they fell within the limits of our contract with our line dealers.

Q. Depending upon the size of the shipment you might not deliver it yourself, you might deliver it to other carriers to deliver it?

A. We serve roughly 1,000 points, there are a few points that we elect not to serve on daily l.t.l. service.

Q. And that is because an operating condition or some other condition in your company, not dictated by the shipper necessarily, but by your necessity, isn't that right? [fol. 442] A. Our problem, yes.

Q. It is your problem.

Now tell me, you run a relay system, don't you?

A. Yes, sir.

Q. What is known as a relay system?

A. Yes, sir.

Q. And your relay point for Arkansas is in Little Rock, isn't it?

A. One of them, yes, sir.

Q. Where is the other?

A. Texarkana, Memphis, and St. Louis.

Q. Well, Memphis is in Tennessee, or—

A. (Interrupting) Yes, sir.

Q. (Continuing) —and St. Louis is in Missouri?

A. Right.

Q. And Texarkana is in Wyoming?

A. Arkansas.

Q. Under your relay system it is necessary, isn't it, for you to dispatch a vehicle at a scheduled time in order to make the relay at the next point so that the driver at that

point can take the trailer and go through on your service, isn't that right?

A. It is dispatched from both directions, yes, sir.

Q. And the dispatch of your vehicle on a relay system is dictated by the frequency of the relay, isn't it, Mr. Fuller?

[fol. 443] A. To a certain extent, yes.

Q. Now tell me about this load of cans that your counsel had you transporting all over the countryside, particularly the one that had the X-ray commodities in there, the heavy commodities that give you more profit back out of Chicago. Let's take a load of these canned goods to Springdale, Arkansas, where you had some other heavy loading commodities in there from, let's say, a point in Illinois, that would be frequent in your operation, wouldn't it, that would be the way you handle it?

A. I don't follow you on the frequency part.

Q. I am sorry, let me go back.

In transporting cans they are what you refer to as "balloon freight", aren't they?

A. Yes.

Q. Now in order to improve the revenue per mile on such light and bulky freight, you would need that heavy loading commodities if you could get them in the trailer to improve your revenue, is that correct?

A. That is a daily practice, yes.

Q. Now those in a shipment, for example, from some point in Illinois to the Steel Canning Company, you would, if possible, put in some other commodities, some heavy loading commodities at the point of origin for some other shipper or some other consignee, other than Steel, would you not?

A. That is quite possible.

[fol. 444] Q. And a point of fact, you might put in some heavy-moving commodities from Waco, commodities moving to Dallas, Texas, even though it had on a Springdale shipment of cans, is that possible in your operation?

A. Yes, sir.

Mr. Matthews: May I ask counsel for clarification on this point?

Are you talking about l.t.l. shipment to Kansas or truck-load?

Mr. Layne: I am talking about l.t.l.

By Mr. Layne:

Q. Now on shipments of cans, do you also try to load something else in the vehicle?

A. We truck and load freight to every shipment that we transport, we operate our equipment to maximum load capacity.

Q. And because of the light and bulky nature of cans, you would also try to load in a vehicle with cans?

A. Yes.

Q. Now we have these cans with something else in them, the cans going to Springdale and something else going to Dallas, now on your relay system that would be dispatched out of Chicago and where is your first point of relay?

A. St. Louis.

Q. At that point you would put another tractor on it, is that right?

A. No, sir, they shift.

[fol. 445] Q. The driver, you change driver, and then you go where?

A. Little Rock.

Q. Now what happened at Little Rock?

A. The trailer is backed in the dock and the interchanged freight is pulled off and Little Rock adds to that their south freight that might be destined to what you chose as a destination.

Q. So you take the cans off at Little Rock?

A. Right.

Q. And then they are on the dock somewhere in your operation, and then you turn those over to some other carrier?

A. That is right.

Q. From and go to Springdale?

A. There is a possibility.

Q. This one, before you get on to yours, this one you turn your cans over to other carriers, right?

A. I want to clarify that, we could pull the other freight over and leave the trailer there and—

Q. Well, it would depend on what your judgment of your particular manager and who your dock foreman is?

A. Yes.

Q. And then that is turned over to some other carrier, perhaps in your trailer, perhaps not, to take it on to Springdale, that is what the operation is?

A. That would be correct.

[fol. 446] Q. And that would be about the same way on outbound commodities if necessary, there are additional space or additional weight that could be added to any movement, is that right?

A. Yes.

Q. And in order to make drop-off shipments in your relay system, you have to take the shipments first to your relay point and then so-called peddle it out from your relay point, don't you?

A. I don't quite follow you there.

Q. Well, now, let's see, in order to make small shipments in drop-offs, in small drop-offs, you might, in your operation with the relay, take the vehicle to the next relay point and pull the freight off there rather than dropping it en route, wouldn't you, in order to make your relay work on time?

A. It would depend on the point.

Q. And that at least could happen in your system, couldn't it?

A. We do both now.

Mr. Layne: That is all I have. Thank you.

Exam. Hanback: Any redirect examination?

Redirect examination.

By Mr. Matthews:

Q. Does your company regularly interchange trailers with other regular route carriers?

A. We do.

Q. And is it your policy to interchange trailers with Arkansas Best Freight System, for instance?

[fol. 447] A. We do.

Q. Is there anything about full truckload of cans that would keep you from loading interchange service if the shipper wanted it?

A. There is no big problem, no.

Q. Steel Canning Company, the Steel Packing Company, the McCain Packing Company, do they call upon you for service?

A. To my knowledge they have not.

Mr. Matthews: That is all.

Exam. Hanback: Any further questions of the witness?

(No response.)

Exam. Hanback: The witness is excused.

(Witness excused.)

#### OFFERS IN EVIDENCE

Mr. Matthews: I now offer Exhibits Nos. 35 to 38, inclusive, in evidence.

Exam. Hanback: Any objections?

(No response.)

Exam. Hanback: Exhibits Nos. 35 through 38, inclusive, are received in evidence.

(Protestant's Exhibits Nos. 35 through 38, inclusive, Witness Fuller, were received in evidence.)

Exam. Hanback: We will take a five-minute recess.

(Short recess.)

Exam. Hanback: Come to order.

Call your next witness.

[fol. 448] FRANK ASHLAND was sworn and testified as follows:

Mr. Matthews: I have a certificate to be marked for identification.

Exam. Hanback: It will be Exhibit No. 39.

(Protestant's Exhibit No. 39, Witness Ashland, was marked for identification.)

Mr. Matthews: I have a second certificate to be marked for identification.

Exam. Hanback: It will be Exhibit No. 40.

(Protestant's Exhibit No. 40, Witness Ashland, was marked for identification.)

Mr. Matthews: I have a list marked, "Gillette Equipment List", to be marked for identification.

Exam. Hanback: It will be Exhibit No. 41.

(Protestant's Exhibit No. 41, Witness Ashland, was marked for identification.)

Mr. Matthews: I have here another exhibit to be marked for identification.

Exam. Hanback: It will be Exhibit No. 42.

(Protestant's Exhibit No. 42, Witness Ashland, was marked for identification.)

Mr. Matthews: I have a map to be marked for identification.

Exam. Hanback: It will be Exhibit No. 43.

[fol. 449] Direct examination.

By Mr. Matthews:

Q. State your name, please.

A. Frank Ashland.

Q. By whom are you employed?

A. Gillette Motor Truck Lines and Western Truck Lines.

Q. In what capacity?

A. Kansas City.

Q. In what capacity?

A. Office manager.

Q. At Kansas City?

A. Kansas City.

Q. Is Gillette, Inc. a subsidiary of Western Truck Lines?

A. It is.



Q. How long have you been employed by Gillette and Western?

A. About nine years.

Q. In your capacity are you required to be generally familiar with the operations of the Western-Gillette system?

A. I am.

Q. Would you refer to what has been marked for identification as Exhibit No. 39, and state what that is?

A. That is a Certificate of Public Convenience and Necessity, MC-2309, for Gillette Motor Transport.

Q. Would you refer to what has been marked for identification as Exhibit No. 40, and state what that is?

A. That is a Certificate of Public Convenience and Necessity, MC-8948, for Western Truck Lines.

Q. Refer to what has been marked for identification as Exhibit No. 41, and state what that is, please.

A. That is a recapitulation of equipment as of April 1, 1958, owned by Gillette Transport.

Q. Owned by Gillette?

A. Yes.

Q. Is that equipment being operated in capacity?

A. No, it isn't.

Q. Would you refer to what has been marked for identification as Exhibit No. 42, and state what that is?

A. That is a recapitulation of equipment as of April 1, 1958, for Western Truck Lines.

Q. It is owned and operated by Western at the present time?

A. It is.

Q. It is true, is it not, that the equipment of Western and of Gillette shown on these lists move freely over the entire Western-Gillette system?

A. Right.

Q. It is not to the company shown for?

A. No, interchanged over the whole system.

Q. Now is the equipment shown on the Western list, that is Exhibit 42, being operated to capacity at the present time?

A. No, it isn't.

Q. Please refer to what has been marked for identification as Exhibit No. 43, and state what that is.

A. That is a map of Gillette-Western operation, showing also a list of terminals that we serve every day.

Q. Generally, what is the territory covered by the Western-Gillette system?

A. The Gillette end of it serves Oklahoma and Texas.

Q. Kansas City?

A. Yes, Kansas City, and the Western end of it serves Arizona, California, and Nevada.

Q. And operates through New Mexico?

A. And operates also through New Mexico.

Q. Are you generally familiar with the authority which the Applicant seeks in this proceeding?

A. Yes, I am.

Q. And do you realize that so far as the outbound movement of canned goods is concerned, the origin points to Springdale, Lowell, and Springdale, Arkansas, and Westville, Oklahoma?

A. Yes.

Q. Now Western-Gillette system does not serve those points, does it?

A. No.

Q. Do you have connecting lines service to and from those points?

A. Yes, we do.

Q. And what carriers do you connect with to serve those points?

[fol. 452] A. Normally we would use Jones Truck Line into Dallas.

Q. Through Dallas Gateway?

A. Yes.

Q. Could you also change with Arkansas Best Freight system?

A. Yes, we could.

Q. Could you interchange with England Brothers?

A. Yes, we could.

Q. So that if a shipment were tendered to Jones for connection with Gillette-Western at Fort Smith, Arkansas, that is, down to Los Angeles, California, that could be transported all the way through a two-line haul, couldn't it?

A. Yes, in connection with Gillette and Western.

Q. And in connection with that, what is your advertised schedule of service between Dallas and Los Angeles?

A. From Dallas to Los Angeles is second morning delivery.

Q. What about Dallas to Phoenix, Arizona?

A. That is also second morning.

Q. What about Dallas to El Paso, Texas?

A. That is first morning.

Q. And would that same schedule be true in the reverse direction?

A. Yes.

Q. Sir, pages 68 and 69 of the record in this proceeding made at the first hearing there are mentioned rates charged by the applicant herein under temporary authority between certain points. Those points are the origin points in [fol. 453] this case was Springdale, Arkansas, and the destinations were Mansfield, Ohio, Canton, Ohio, Akron, Ohio, and Cleveland, Ohio.

Have you made a check in the tariffs that are on file in your office to see what the applicable rates are C.I.E. regular route motor common carrier inward to what you participate?

Mr. Layne: I object to the question.

Mr. Matthews: I am asking if he made an investigation.

Mr. Layne: Let me object to it. I object to the question. I object to it for two reasons, in the first place, it's an improper statement of what is reflected in the record, and in the second place, it's irrelevant in any inquiry in this proceeding.

I might point out to the Examiner if this representative of the Western and subsidiary Gillette system would like to file any kind of a complaint with the Commission under the appropriate sections of the Act, he may do so.

I want to point out the degree to which this is inaccurate, that he referred to it as "temporary authority", as obviously at the time that he was told, at the time that he was talking about rates had been put in on an emergency affair.

Mr. Matthews: E.T.E. rates then A.T.A., however, I

would like to point out that this carrier is not complaining about its own rates. What we are trying to do would be to show since the supporting shippers herein have stated that one of these is basis for support of this carrier is their belief that the l.t.l. rates by existing regular route carriers are prohibitive.

[fol. 454] I think the record should show what those rates are in relationship to those charged by the applicant herein under the E.T.A.

Exam. Hanback: Overruled. You may answer.

I would like to know the carrier that you are referring to and one that you have no interline connection with.

By Mr. Matthews:

Q. Would you state for the record what tariff you referred to in your statement?

A. That was middlewest tariff number 958.

Q. Now that is what is known as an "open routing tariff". By that I mean that the rates would apply to any carriers parties to that tariff unless these flag out?

A. Yes.

Q. So that it wouldn't make any difference what carrier—strike that—so that the rates would apply by any carriers over a practical route between the points involved, is that right?

A. That is right unless they had flagged out a particular route.

Mr. Matthews: Now, Mr. Examiner, I submit that under those conditions it is rather ridiculous to be naming each and every carrier that could possibly serve between Springdale, Arkansas, and points in Ohio. There could be five, ten, fifteen, or twenty of them.

Mr. Layne: None of them would involve Gillette or Western. I am going to object to it.

Exam. Hanback: I don't care which carrier it is as long [fol. 455] as it is some carrier that Gillette is interchanging with. It would have to be in Kansas City, would it not?

The Witness: Yes.

Exam. Hanback: Well, if you have a carrier that is in that tariff, interchange tariff, you may testify.

By Mr. Matthews:

Q. Who do you interchange with in Kansas City from point moving in and from Ohio, Akron, for instance?

A. You mean from Kansas City to these points in Ohio?

Q. Interchange in Kansas City going to a point in Ohio, who do you work with going to Ohio?

A. In these four points I think direct by Morrison Motor Freight.

Q. Would there be others that you operate between Kansas City and Ohio with whom you could interchange?

A. Yes.

Q. Doesn't Riss operate over there?

A. Yes, we could.

Q. As a matter of fact there is a large number of them?

A. Yes.

Mr. Matthews: Mr. Examiner, I would like to point out the places actually for this witness states his experience as a rate clerk and in reading tariffs. Now we are simply attempting to show what the regular common carrier rate is, we are not—Gillette in his connection it probably would, but what we are attempting to do is simply let this expert rate man state what it shows, where he can verify it in Washington, D. C.

[fol. 456] Mr. Layne: May I ask this question on voir dire?

By Mr. Layne:

Q. Actually, as a matter of fact, movements from Springdale, Arkansas, Lowell, Arkansas, Fort Smith, Arkansas, and Westville, Oklahoma, would not be originated by Gillette or Western?

A. No.

Q. And that would be true with shipments moving to Ohio points, that is true, too, you would not originate those shipments moving to Ohio?

A. No.

Q. If you were originating shipments, move on Ohio, those shipments would not move through Kansas City, they would move through St. Louis, wouldn't they?

A. Not by our—

Q. (Interrupting) What is the most direct route, south-east?

A. Yes.

Q. And that wouldn't involve Gillette or Western at all in that movement, would it?

A. No.

Q. So that if a shipper, any shipper, used the most logical routing of his freight from those points in Arkansas that I just mentioned, and a point in Ohio, Gillette and Western would never be involved, would they?

A. Not by the most direct route.

Mr. Layne: I object to any further questions.  
[fol. 457] Exam. Hanback: Witness may answer. I will overrule the objection.

By Mr. Matthews:

Q. Now would you state what you found as a result of your investigation?

A. You want these rates?

Exam. Hanback: You may testify as a tariff expert.

A. Yes.

By Mr. Matthews:

Q. I want you to give the tariff references and what you found at that part of the tariff, the item number and that sort of thing.

A. The rate from Springdale, Arkansas,—now this is on Kansas City from Springdale, Arkansas, to Mansfield, Ohio—is \$1.14 a 100 on 20,000 minimum.

Exam. Hanback: Commodity rate or class rate?

The Witness: Commodity freight rate.

A. (Continuing) The rate from Springdale to Canton, Ohio, is \$1.24 on 20,000 minimum, \$1.18 on 30,000 minimum; from Springdale to Akron, Ohio, is \$1.24 on 20,000, \$1.18 on 30,000; from Springdale to Cleveland, Ohio, is \$1.24 on 20,000, \$1.18 on 30,000.



By Mr. Matthews:

Q. Now do you state for the record that the tariff authority there is in number, item, and everything?

A. The tariff authority is middlewest tariff 95-B, item number 5608-B, sub. number 82.

Q. Now does that tariff also provide for stopping-in- [fol. 458] transit service in connection with those rates?

A. Yes.

Q. How many stops?

A. You are allowed two stops in addition to the final destination, at the destination, plus two intermediate stops.

Q. In your investigation also did you find out what the classification of canned goods is so far as that territory is concerned, those points?

A. The classification is Column 60.

Q. And that would apply to l.t.l. shipments?

A. Yes.

Q. Do you consider canned goods a desirable commodity for transportation over the Western-Gillette transportation system?

A. Yes.

Q. Do you consider empty cans to be a desirable commodity over your system?

A. Yes, I do.

Q. And what about caustic soda, is that desirable?

A. Yes.

Q. And sugar?

A. Yes.

Q. As a matter of fact, do you know if you have transported any of those commodities in the past, offhand?

A. It's been quite sometime ago.

Q. Well, have the Steel Canning Company, the Keystone [fol. 459] Packing Company, or the McCain Canning Company ever, to your knowledge, offer your company for shipments for transportation?

A. Not to the best of my knowledge.

Q. Has any of those three companies, to the best of your knowledge, ever filed a complaint case with the Commission complaining of the rates applicable via your system?

A. No.

Mr. Matthews: You may cross examine.

Cross examination.

By Mr. Layne:

Q. Tell me, you said your equipment was not operating to capacity, do you mean by that that your trailers, when they go down the highway, are not loaded to the maximum capacity that is permitted under the state law with reference to weight of vehicles?

A. No.

Q. Or do you mean, is that part of what you mean?

A. That is what I mean, I mean we always have trailers sitting on our lots empty that could be used.

Q. How many pieces of equipment that are listed here on your equipment list that you regard as surplus, that your company regards as surplus equipment, on Exhibits 41 and 42?

A. Well, that's hard to tell.

Q. Well, you told me that you had them sitting around, do they just sit around there regularly?

A. Sometimes there may be just a few.

[fol. 460] Q. I see. You mean on Monday there may be one sitting there, but on Tuesday there may not be one sitting there, is that what you mean?

A. That is possible.

Q. Well, it's not a question of whether it's possible or not, I am trying to find out what you meant by your vehicles not working in capacity. You mean on that you may not have a shipment for a trailer and the next day you may have?

A. Yes, that's possible.

Q. I see. Now on the day that you have a particular trailer it would be available and you desire traffic for it, is that right?

A. Yes.

Q. On the day that it's already busy, if you had the traffic for it you couldn't transport it, could you?

A. Well, sir, we normally have more than just one trailer sitting around, there may be ten or one or—

Q. (Interrupting) Or none?

A. Yes, it's possible, but if we ever do run up against a thing like that there is usually other carriers that we can borrow a trailer from.

Q. And does it sometimes happen that where you have these trailers sitting around may be in Dallas, and not in Kansas City, you may be overbalanced on one end of your run as against the other, does that happen in your system? [fol. 461]

A. No, there is a set amount of equipment that is supposed to be at each station.

Q. I see, and that depends upon your existing flow of traffic?

A. Yes.

Q. So what you want is traffic that would load in a particular direction that the trailers are now moving empty, is that right?

A. Yes.

Q. Can you tell me whether your trailers are moving preponderantly, moving northbound or southbound?

Mr. Matthews: I am going to object.

By Mr. Layne:

Q. Let's say Kansas City-Dallas, is your operation balanced or heavy northbound, or heavy southbound, or do you know?

A. Well, it is normally heavier southbound than it is northbound.

Q. So really what Gillette wants, it is Gillette that is over on that part of the system?

A. Yes.

Q. What Gillette wants is more traffic moving northbound?

A. Yes, I guess so.

Q. Now how about from Dallas to the West Coast regular shipments—

A. (Interrupting) Yes.

Q. (Continuing) —is your movement heavier eastbound [fol. 462] or westbound from Dallas to points on the West Coast?

A. I am not familiar with that.

Q. I see. Now you are, however, familiar with tariffs?

A. Yes, sir.

Q. Motor carrier tariffs; that is in the department, as a matter of fact, the company in which you work, isn't it?

A. Yes.

Q. Now can you tell me, as a rate expert, whether you regard canned goods on commodity rate as a lower rate commodity as other commodities generally handled by—

Mr. Matthews (Interrupting): I am going to object to that question. I think the tariff will speak for itself, anyway.

Mr. Layne: Well, it would have in the first place, but you opened it up.

Mr. Matthews: I am just pointing out the rates that are in the tariff.

Exam. Hanback: Objection overruled.

Do you understand the question?

By Mr. Layne:

Q. Don't you regard canned goods in rate making and in tariffs as a low-rated commodity?

A. By l.t.l. or—

Q. (Interrupting) Truckload.

A. Yes, truckload would be.

Q. As a matter of fact, the revenue produced per mile on canned goods is much lower than the revenue produced [fol. 463] a mile on a large number of other articles, isn't that right?

A. Yes.

Q. As a matter of fact, canned goods rates would be what is known as the lower rates in the tariff, isn't that right?

A. Yes.

Q. The rate level, generally speaking, in your experience as a tariff expert has something to do with the desirability of traffic, so far as the motor carrier is concerned, does it not?

A. Yes.

Q. And, generally speaking, motor carriers transport

those commodities which return a high revenue per mile of operation?

A. Yes.

Q. And that would be true of Gillette and it would be true of Western, wouldn't it?

A. Yes, sir.

Mr. Layne: That is all I have.

Exam. Hanback: Any redirect?

Redirect examination.

By Mr. Matthews:

Q. Sir, does your company desire both north and south-bound traffic between Kansas City and Dallas?

A. Yes.

Q. Do you have all the traffic you need in either direction?

A. No, we don't.

Q. This so-called high-rated traffic and low-rated traffic, [fol. 464] is it your practice to ignore so-called low-rated traffic when you have empty equipment sitting around as you do now?

A. We do not.

Q. Now specifically, do you consider canned goods to be desirable traffic at the present applicable rate?

A. Yes, I do.

Q. And you are not trying to offer carrying it, are you?

A. No.

Exam. Hanback: Any further questions of the witness?

(No response.)

Exam. Hanback: You are excused.

(Witness excused.)

#### OFFERS IN EVIDENCE

Mr. Matthews: I offer Exhibits 39 through 43 in evidence.

Exam. Hanback: Any objections?

(No response.)

Exam. Hanback: Exhibits Nos. 39 through 43, inclusive, are received in evidence.

(Protestant's Exhibits Nos. 39 through 43, inclusive, Witness Ashland, were received in evidence.)

Exam. Hanback: Off the record.

(Discussion off the record.)

Exam. Hanback: On the record.

Call the next witness.

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[fol. 465] C. Q. PERREAU was sworn and testified as follows:

Direct examination.

By Mr. Ryan:

Q. Would you state your name and address for the record, please?

A. C. Q. Perreau, traffic freight agent, Great Northern Railroad Company, headquarters St. Paul, Minnesota.

Q. How long have you been employed by the Great Northern?

A. Thirty-six years.

Q. What are your duties at the present time?

A. Freight traffic solicitation.

Q. What are your duties with reference to Interstate Commerce Commission hearings, if any?

A. To attend when called on.

Q. To provide what?

A. Testimony in behalf of our railroad.

Mr. Ryan: I have a document to be marked for identification entitled, "Freight train schedules on the Great Northern Railroad".

Exam. Hanback: It will be Exhibit No. 44.

(Protestant's Exhibit No. 44, Witness Perreau, was marked for identification.)



Mr. Ryan: And may the map be given the next exhibit number?

Exam. Hanback: Exhibit No. 45 will be marked for identification.

(Protestant's Exhibit No. 45, Witness Perreau, was [fol. 466] marked for identification.)

By Mr. Ryan:

Q. Would you describe Exhibit No. 44 briefly?

A. It is our freight train schedule of our railroad, Great Northern Railway, from Minneapolis, Minnesota, and Sioux City, Iowa, to representative cities in the States of Minnesota, North Dakota, and South Dakota, and Wisconsin, as shown the destinations on Exhibit No. 44.

Q. Would you describe Exhibit No. 45, please?

A. It is a profile map of our entire railroad with the eastern terminal as what is known as "The Twin Cities", it includes St. Paul, Minnesota, transfer to Minneapolis, Minnesota. Also the eastern terminal of Sioux City, Iowa.

Q. Does your railroad provide a mounting and transfer privilege?

A. Yes, sir.

Q. On canned goods?

A. Canned goods, yes, sir.

Q. Does your railroad consider this traffic to be valuable traffic?

A. Very valuable.

#### OFFERS IN EVIDENCE

Mr. Ryan: I would like to offer these two exhibits in evidence.

Exam. Hanback: Any objections to the Exhibits Nos. 44 and 45 to be received in evidence?

(No response.)

[fol. 467] Exam. Hanback: They will be received in evidence.

(Protestant's Exhibits Nos. 44 and 45, Witness Perreau, were received in evidence.)

Cross examination.

By Mr. Layne:

Q. Is there any traffic now transported by Great Northern that you would not consider valuable traffic?

A. We consider all traffic valuable.

Q. Tell me, in the Exhibit No. 44, is it a representation of time in transit of cars, rail cars, is that a fact?

A. Rail carloads, yes, sir.

Q. And it would be a longer time in transit for if the car was stopped at various points?

A. True.

Mr. Layne: Thank you, that is all I have.

Exam. Hanback: You may be excused.

(Witness excused.)

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W. L. KAHILL was sworn and testified as follows:

Direct examination.

By Mr. Ryan:

Q. Would you state your name and address?

A. My name is W. L. Kahill. I am located at 80 East Jackson Boulevard, Chicago 4, Illinois.

Q. By whom are you employed?

A. By the Atchison-Topeka & Santa Fe Railroad.

Q. How long have you been employed?

[fol. 468] A. Forty-five years.

Q. What is your present capacity with that railroad?

A. Commerce agent of the Santa Fe Railroad.

Q. What are your duties?

A. It involves handling of commerce work and appearing before the Interstate Commerce Commission and State Regulatory Bodies in I.C.C. cases.

Q. Do you have access to company records?

A. Yes, sir, I do.

Q. Are you familiar with the scope of this application?

A. Yes, sir.

Q. Did you have prepared, or did you prepare, an exhibit to be presented at this hearing?

A. Yes, I did.

Mr. Ryan: May this document be given the next exhibit number?

Exam. Hanback: It will be Exhibit No. 46.

(Protestant's Exhibit No. 46, Witness Kahill, was marked for identification.)

By Mr. Ryan:

Q. I wonder if you would briefly describe Exhibit No. 46, please?

A. Part A is a map of the Atchison-Topeka & Santa Fe Railway of lines of profile map; and part B is a statement consisting of five pages showing conjunction with the Atchison-Topeka and Santa Fe interchanged freight traffic; part C is a statement showing track mileage operated, the [fol. 469] mileage of sidings, and industry tracks, the mileage of track control system; D is a state, is an agency in prepaid statements; E had an S.A. revenue carload of tonnage in less-than-carload tonnages for the years 1953, '54, and '55, '56, 1957, on the first and quarters of 1958, with the Atchison, Topeka and Santa Fe Railway; F is a statement showing the organization of the traffic department, showing the agencies and off-line solicitation agencies; G is a carload movement of canned goods between California, New Mexico, Arkansas, and Oklahoma, handled by the Santa Fe; H is a statement showing equipment as of December 31, 1957, and on order January 1, 1958; I is gross capital expended for the years 1952 to 1957, inclusive; J is a statement showing the cars tonnage gross revenues and average per ton for the six I.C.C. commodity groups compared with group 763 food; N, O, is in cans and packages not frozen; and P is schedule of Santa Fe from, to, which we receive in the case to California.

Q. Does your railroad provide drop-off service in transit?

A. You mean "stop-off".

Q. Stop-off.

A. Yes, they do.

Q. Does your railroad consider the movement of canned goods east to west or west to east important traffic?

A. Yes, we do.

Q. Does your company participate in the movement of [fol. 470] salt and caustic soda?

A. We participate in all the traffic that is tendered to us for handling.

#### OFFER IN EVIDENCE

Mr. Ryan: I would like to offer Exhibit No. 46 into evidence.

Exam. Hanback: Any objections?

Mr. Layne: No, sir.

Did you have any other statements you would like to make?

The Witness: No, sir.

Exam. Hanback: Exhibit No. 46 will be received in evidence.

(Protestant's Exhibit No. 46, Witness Kahill, was received in evidence.)

Exam. Hanback: Cross examine.

Mr. Layne: No cross examination.

Exam. Hanback: Witness is excused.

(Witness excused.)

Exam. Hanback: Anything else to offer at this time?

Do you wish to file briefs?

Mr. Layne: No.

Exam. Hanback: No brief to be filed.

Take official notice of it in Docket No. MC-1124.

You represent a hearing. Wanted the authority noted.

Very well, the hearing is closed.

(Whereupon, at 11:00 a.m., Tuesday, October 21, 1958, the hearing was closed.)

[fol. 471]

## BEFORE THE INTERSTATE COMMERCE COMMISSION

REPORT AND ORDER RECOMMENDED BY H. L. HANBACK, TRIAL  
EXAMINER—Served January 2, 1959

## NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

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No. MC-117391

## E. L. REDDISH CONTRACT CARRIER APPLICATION

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Decided

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Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities, (1) from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in 33 States, and (2) from points in 30 States to Springdale, Lowell, Fort Smith, and Westville, found consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

[fol. 472] *John H. Joyce and A. Alvis Layne* for applicant.  
*John C. Ashton, Edward G. Bazelon, Carl V. Kretsinger, J. Max Harding, Hugh T. Matthews, E. L. Ryan Jr., J. W. Durdan, Roy L. Eyster, Jerry Presbridge, Marion F. Jones, Gerald A. Orschein, Vernon M. Masters, Thomas D. Boone, G. F. Gunn, Jr. and Chester G. Hayes, Jr.*, for protestants.

## REPORT AND ORDER

Recommended by H. L. Hanback, Hearing Examiner

By application filed May 13, 1958, as amended, E. L. Reddish, of Springdale, Ark., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) of canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Okla-



homa City and Tulsa), Pennsylvania, Tennessee (not including Memphis), Texas (not including Dallas and Fort Worth), Virginia, West Virginia, and Wisconsin, and (2) of canned goods, and materials and supplies used in the manufacture of canned goods, from points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago for articles other than metal cans and lids), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis for articles other than boxes), and Texas (not including Dallas and Fort Worth), to Springdale, Lowell, and Fort Smith Ark., and Westville, Okla.

The proposed service is to be limited to a transportation service to be performed under a continuing contract or contracts with Steele Canning Company, of Springdale, Ark., Keystone Packing Company, of Fort Smith Ark., and Cain Canning Company, Inc., of Springdale, Ark., hereinafter called Steele, Keystone, and Cain respectively.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on June 23, 1958 and October 20, 1958, at [fol. 473] Kansas City, Mo. Southwest Railroad Association, class I rail carriers in western trunkline territory, and 25 motor carriers<sup>1</sup> oppose the application.

Applicant holds no permanent motor carrier authority. Prior to March 19, 1946, he drove motor vehicles for certain motor carriers, and also repaired Army vehicles. From March 19, 1946 to about January 1, 1953, he owned about two tractors and trailers, and utilized the equipment in the transportation of exempt commodities, between unspecified points. During the period about January 1, 1953 to June 12, 1958, he leased tractor-trailers units to Steele under long-

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<sup>1</sup> Frisco Transportation Company, Watson Bros. Transportation Company, The Chief Freight Lines Company, East Texas Motor Freight Lines, Inc., and others.

term arrangements. On June 12, 1958, he had nine tractor-trailer units under lease to Steele. Because of a strike at Steele's plants applicant obtained emergency authority for the period June 12, 1958, to July 28, 1958, authorizing the movement (1) of canned goods for Steele from Springdale, Lowell, Fort Smith, and Westville, to Baltimore, Md., Newark, N. J., and various specified points in the other States here involved, (2) of new tin cans and lids for Steele, from Chicago, Ill., Elwood, Ind., Norwood, Ohio, and Houston, Tex., to Springdale and Lowell, and (3) of corrugated fibre-board boxes for Steele, from Monroe, La., and Memphis, to Springdale and Lowell. This authority was extended to September 26, 1958. On July 21, 1958, he obtained temporary authority to serve Steele for a period of 90 days beginning July 28, 1958, in the movement of canned goods, in pool-truck shipments, from the origin points to the destination points mentioned in (1) above. The temporary has been extended and is now conditioned to expire upon final determination of the issues involved in the instant proceeding.

Applicant has been transporting Steele's traffic under contract. For example, during the period June 14, 1958 to July 16, 1958, when applicant held emergency authority, he transported shipments of canned goods (1) from Springdale and Lowell to Baltimore, Philadelphia, Pa., Charleston, W. Va., Newark, N. J., Denver, Colo., Tucson and Phoenix, Ariz., Tuxedo, Miss., and points in Ohio, Wisconsin, Minnesota, Iowa, Illinois, Arkansas, Indiana, South Dakota, Kentucky, Missouri, Virginia, North Carolina, South Carolina, Tennessee, Nebraska, (2) from Fort Smith to Richmond and Norfolk, Va., goods, in pool-truck shipments, from the origin points to the destination points mentioned in (1) above, and (3) from Westville to Detroit, Mich., and points in Alabama, Georgia, Illinois, Indiana, and Arkansas. Practically all of these shipments were comprised of freight for delivery at two, three, or four points en route, including points in different States. During the same period he transported (1) shipments of cans and lids (a) from Chicago, Elwood, and Norwood to Springdale, and from Chicago and Elwood to Lowell, (2) five shipments of boxes from Memphis to Springdale, and (3) one shipment of dry beans

from Alma, Mich., to Springdale. He proposes to handle [fol. 474] similar traffic under contracts with Keystone and Cain. The proposed service, if authorized, will be limited to service for these three shippers.

Applicant has a garage and large parking lot in Springdale. He also has appropriate insurance, and maintains a safety program for the several drivers employed by him. His balance sheet as of June 30, 1958, shows total assets of \$92,902, and total liabilities of \$19,195 and a net worth of \$73,707. He is fit and able, financially and otherwise, properly to conduct the proposed operation.

The application is supported by Steele, Keystone, and Cain. Steele manufactures between 500,000 and 800,000 cases of canned fruits and vegetables yearly at its plant in Lowell, and ships the products from that plant and also from its storage warehouse at Springdale to numerous wholesalers, and retailers, including supermarkets and chain stores at points in the States here involved. Because the customers' orders far exceed the capacity of its plant, it purchases annually (1) between 400,000 and 600,000 cases of canned vegetables from Cain at Springdale, (2) between 300,000 and 500,000 cases of canned vegetables from Keystone at Fort Smith, (3) between 800,000 and 900,000 cases of canned dry beans, and canned pork and beans from Baron Canning Company at Westville, and (4) between 500,000 and 700,000 cases of canned fruits and vegetables from Springdale Canning Company at Springdale. It takes title to the goods at the plants of the suppliers, and selects the carrier for the movement direct to the customers, and also for movement to its warehouse in Springdale and reshipment from that point to customers. On occasion it also purchases canned goods including canned spaghetti, from canneries in the "Ozark area" and other sources of supply, for distribution to customers from Springdale and Lowell. For example, it receives (1) canned kraut from Chiocton, Wis., (2) canned corn from Tripoli, Iowa, (3) canned spaghetti from Belleville, Ill., (4) canned beans from unspecified points in the Rio Grande Valley of Texas, and (5) canned vegetables from Laurel, Miss., Haskell and Muskogee, Okla., Cumberland, Tenn., Gillette

and Frederic, Wis., Benton Harbor, Mich., and Alma and Fort Smith, Ark.

Steele also obtains canned tomato paste from several sources of supply in California for use in the manufacture of certain canned goods. In addition, it purchases other materials and supplies at available sources of supply for use in the manufacture, labeling, packaging, and transporting canned goods. It is constantly purchasing the labels used by numerous customers who demand that shipper pickup the labels when it delivers an order of canned goods at the consignee's warehouses so as to have the labels available at shipper's plant for use on the next order made by the customer and avoid the possibility of delays. The [fol. 475] labels used on canned goods sold under Steele's trade name are purchased at Peoria, Ill., Bedford, Va., Omaha, Nebr., Cincinnati, Ohio, and unspecified points. Most of Steele's labels are purchased at Peoria and Omaha. Shipments of the labels range from about 30 pounds to 12,000 pounds in weight. Fresh fruits and vegetables are purchased principally at points within 100 miles of Springdale, and in practically all instances the suppliers in that area make delivery in their own equipment to Steele's warehouse at Springdale. It also has occasion to purchase fresh fruits and vegetables in other areas. It has obtained (1) blackberries from Tyler, Tex., (2) Irish potatoes from unspecified points in Florida, Alabama, Colorado, Nebraska, South Dakota and Minnesota, (3) sweet potatoes from unspecified points in Louisiana, Alabama, Tennessee, North Carolina, South Carolina, New Mexico and Texas, (4) dry beans from unspecified points in Michigan, Nebraska, Colorado, Missouri, and California, (5) boysenberries and strawberries from unspecified points in Arkansas, Oklahoma, and Missouri, (6) raw spinach from unspecified points in the Rio Grande Valley, and (7) fresh peas from unspecified points in Texas. In addition to above-mentioned inbound freight, it purchases, (1) caustic soda at Beloco, Tex., (2) salt at Grand Saline, Tex., Rittman, Ohio and Hutchinson, Kans., (3) sugar at several points in Louisiana, principally Shreveport, (4) corrugated boxes at West Monroe, La., Memphis, and Fort Smith, and (5) tin cans

and lids at Norwood and Cincinnati, Ohio, Elwood, Chicago, Milwaukee, Wis., Mankato, Minn., Houston, Tampa, Fla., Harvey, La., and Springdale. It obtains title to all inbound materials and supplies at the source of supply, and selects the carrier for the inbound movements. All of the materials and supplies, except fresh fruits and vegetables, are shipped to the plants at Springdale, Lowell, Fort Smith and Westville for use in the manufacture, labeling, and packaging of canned goods purchased or produced by Steele. The fresh produce moves to Steele's warehouse at Springdale. The inbound traffic, other than labels, moves principally in straight truckloads. In some instances a small volume of labels or cans will move in the same vehicle with other inbound freight including damaged or rejected canned goods. It ships a substantial volume of canned goods, in straight truckloads, from Springdale, Lowell, Fort Smith and Westville to points in the States here involved. It also ships a substantial volume of this traffic, in pool-loads from the four points mentioned immediately above to numerous points in the States here involved. A pool-load is comprised of small volume orders of several customers, and a pool-shipment requires up to six or more stops en route for delivery to consignees in two or more States. It frequently obtains customers at new locations. At the time of hearing it had canned goods' customers (1) at Newark and Kearney, N. J., and Baltimore, (2) at five points in Pennsylvania, (3) at seven points each in Colorado and Florida, (4) at 10 points each in Nebraska and New Mexico, and (5) at various points in the other States here involved.

Rail service is seldom used because Steele requires prompt motor carrier service for the movement of the inbound and outbound traffic here involved. It is obtaining satisfactory service from the existing motor common carriers on straight truckload shipments of canned goods from [fol. 476] and to the points here involved, and the record indicates that some of these motor carriers have provided satisfactory service on some truckload shipments which required stopoffs for delivery of a portion of the freight at one or two points en route to final destination. It de-

pendes primarily on Jones Truck Line, Inc., hereinafter called Jones, to pick up this traffic at Springdale, Lowell, Fort Smith and Westville. Jones provides service to authorized destination points, and selects the connecting carriers for joint-line movements to points beyond its authorized territory. Steele will continue using the services of the existing motor carriers on these truckload shipments of canned goods from Springdale, Lowell, Fort Smith and Westlake to destination points.

Steele professes a need for the proposed service on the outbound shipments of canned goods which must be consolidated into pool loads and delivered at several points en route, and also on shipments of its inbound traffic the movement of which must be coordinated with shipper's production and shipping schedules on its outbound traffic. The average order of numerous customers who purchase its canned goods, including a large number of consignees located at off-rail points, ranges from 3,000 pounds to 10,000 pounds each. These small-order customers, which have increased substantially since 1948, normally operate on a 10 day supply, and prompt delivery of new orders to replenish the stock must be provided by shipper on specified delivery dates so as to satisfy the demands of the customers and avoid a loss of an account to anyone of several competitors who make prompt delivery of their traffic by private carriage. Because of the competitive situation, and the small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that shipper would be forced out of business if it had to ship the numerous small orders of canned goods, in less-than-truckload quantities, at less-than-truckload rates, and that successful operation of its business necessitates the movement of this traffic in consolidated loads either by private carriage, or by for-hire motor carriers at truckload rates. Based on information obtained by shippers' representative in his contract with several existing motor carriers in the past several years, he is convinced that none of the existing motor carriers are able to meet shipper's transportation requirements on its inbound traffic, and the numerous outbound shipments of the small-order freight here involved.

In 1948, Steele purchased two tractors and two trailers for use in the movement of the small-order traffic in con-



solidated loads, which enables it to operate economically and provide prompt delivery service in the same vehicle to several customers en route. As the volume of small orders increased, shipper acquired additional equipment. About January 1, 1958, it was operating 29 tractors and 29 trailers, including nine tractor-trailer units leased from applicant, and it was handling outbound and inbound traffic to and from various points in the States here involved. Because [fol. 477] of a strike at the plants, which began about March 1, 1958 and was continuing at the time of last hearing, on October 21, 1958. Steele's private carrier fleet had been reduced to eight tractor-trailer units on the latter date, and applicant was using nine tractor-trailer units to handle some of shippers inbound and outbound traffic under temporary authority. As shown above, during the period June 14 to July 16, 1958, applicant transported a substantial volume of Steele's small-order traffic in consolidated loads, and some shipments of inbound freight under emergency authority, and at the time of the last hearing he held temporary authority for the movement of shipper's outbound traffic. The service rendered by applicant under emergency and temporary authority is substantially similar to the private carrier operations performed by Steele. Shipper is desirous of discontinuing all private carrier operations, and to utilize applicant as a substitute therefor. It will enter into an appropriate contract with applicant if the authority sought was granted.

Steele's freight has been solicited by several motor carriers. Its representative is unfamiliar with the authorized services provided by some of the opposing motor carriers. He is aware that Wright Motor Lines, and Loving Truck Lines, hereinafter, called Wright and Loving, respectively, are authorized to transport the traffic here involved to and from some points in Colorado; however, Steele has not used the service of that carrier chiefly for the reasons that motor carriers now domiciled in the Arkansas area could handle the small volume of traffic shipped by it to and from Colorado points, that about October 3, 1958, Steele's representative contacted an employee of Loving for the purpose of determining whether that carrier could handle a shipment originating at Springdale and consisting of canned goods

for customers at Davenport, Iowa, and Galesburg, Ill., and from his conversation with the carrier's employee he understood that Loving had authority to transport shipper's traffic to and from Colorado points, that it had no interchange arrangements with any motor carriers at Kansas City, and that it was willing to deliver the shipment mentioned above to a connecting carrier at Denver. Routing of the shipment via Denver would be circuitous and impractical. Some shipments made in the past to Colorado points have contained freight for delivery en route at Kansas points. He mentioned situations where some of the opposing carriers would be unable to render complete service on a consolidated shipment of canned goods. For example, he points out that Frisco Transportation Company, hereinafter called Frisco, has no authority to serve Westville, and that shipper has occasion to ship canned goods in the same vehicle from Springdale and Westville to customers at certain points including Ada, Okla., Memphis, Tenn., and points in Texas. Shipper has received some complaints from customers in respect of delays and damages on less-than-truckload shipments of canned goods which moved in joint-line hauls. It prefers single-line service for the movement of all traffic. [fol. 478] From his discussions with Jones, and also with Arkansas-Best Freight System, Inc., Campbell Sixty-Six Express, Inc., and M. & A., Transportation Company, hereinafter called Best, Campbell, and M. & A., respectively, shipper's representative has concluded that the only possible way to utilize these carriers for the movement of a substantial volume of the small-order traffic is to ship the freight in less-than-truckload quantities at prohibitive rates.

Cain produces between 500,000 and 600,000 cases of canned vegetables yearly at its plant in Springdale. Prior to the commencement of the strike mentioned above, about 75 percent of the production was sold to and shipped by Steele, and 25 percent was sold to customers who picked up their freight at the plant. Since the strike began, the volume of sales to Steele has been reduced about 10 percent, and has resulted in a large excess inventory at Cain's plant. It is willing to provide the volume of canned goods which will be required by Steele in the future; however, it is desirous of selling and shipping a substantial portion of its

production to customers at various points in the States here involved so as not to be dependent on one or more large customers for the sale of its canned goods. It recalled that many dealers in canned goods order their supplies in less-than-truckload quantities, that since about June 1, 1958, it had made several shipments in straight truckloads to customers at Chicago, Kansas City, and St. Louis, and that it receives a small volume of inbound freight. Shipper has the conviction that it could not successfully invade the territory here involved if it had to ship its canned goods in less-than-truckload quantities at less-than-truckload rates, that it would need a motor carrier that is able to handle the small-order traffic in pool loads, that it is unable to obtain the latter type of service from the existing motor carriers, and that applicant should be granted authority to handle its inbound traffic as well as the outbound freight because the inbound payload would enable the carrier to render a better service on the outbound movements. Admittedly, shipper is not very familiar with the services provided by the existing motor carriers. Its plant is not located on a rail siding.

Keystone produces between 400,000 and 500,000 cases of canned vegetables yearly at its plant in Fort Smith. Prior to the commencement of the strike mentioned about 75 percent of its products were purchased and shipped by Steele, and the remaining 25 percent was sold by Keystone and delivered by rail and motor carriers to customers at certain points in the territory here involved. Of the 25 percent mentioned above, 20 percent moved by motor carrier principally in straight truckloads, and 5 percent moved by rail. Its plant is located on a rail siding. It also purchases and receives fresh vegetables, and a small volume of salt, soda, sugar, cans and boxes. Its vegetables are delivered by the supplier, and the other inbound freight is handled in its own equipment and the facilities provided by the existing carriers.

[fol. 479] Because of the strike, Steele has been purchasing between 60 and 65 percent of the plant's production, and Keystone has been selling and delivering a small portion of the excess stock in two new tractors and trailers purchased by it. At the time of hearing it had customers

at Birmingham and Montgomery, Ala., Atlanta, Augusta and Savannah, Ga., Jacksonville and Miami, Fla., Carbondale, Kankakee, Peoria, Murphysboro, Springfield and Chicago, Ill., Indianapolis, Bloomington, Terre Haute and Vincennes, Ind., Topeka and Wichita, Kans., Lexington, Paducah, and Russell, Ky., New Orleans, La., Detroit, Jackson, Miss., Kansas City, Springfield, and St. Louis, Mo., Charlotte and Raleigh, N. C., Bellefontaine, Cincinnati, Cleveland, Columbus, Dayton, and Toledo, Ohio, Newark and Jersey City, N. J., Tulsa, Oklahoma City, Pittsburgh, Pa., Greenwood, S. C., Memphis and Nashville, Tenn., Dallas, Richmond, and one or more unspecified points in New York and West Virginia. Prior to June 1, 1958, shipper had not received many small orders; however, it is aware that numerous dealers order less-than-truckload quantities of canned goods from sources of supply, and it is desirous of soliciting and serving the small-order dealers in all States here involved. Shipper expressed the opinion that it would be unable to make single shipments of less-than-truckload traffic, because of the competitive situation and transportation costs; however, if the proposed service were authorized it would make an effort to obtain sales and ship the freight in pooled loads requiring delivery at two or more points en route. Shipper has obtained satisfactory service on shipments transported by the existing motor carriers in straight truckloads and loads requiring one or two stops en route; however, it has the conviction that these carriers would be unable to provide adequate service on the type of traffic it proposes to ship in pool loads, and that it would be compelled to acquire a number of vehicles for the movement of this traffic in private carriage if the application was denied.

Each of the opposing rail and motor carriers, except Howard J. Nelsen and James Melvin Nelsen, a partnership, hereinafter called Nelsen Brothers, is authorized to operate as a common carrier of the commodities here involved and various other commodities, and each carrier operates a substantial amount of transport equipment. It was stipulated that L. A. Tucker Truck Lines Incorporated, hereinafter called Tucker, of Cape Girardeau, Mo., is operating over regular routes extending from Memphis to St. Louis via Blytheville, Ark., and Cairo, Ill., and from St. Louis to

Evansville, Ind., serving intermediate points, that Be-Mac Transportation Company, Inc., hereinafter called Be-Mac, is operating over regular routes extending from Beloit, Wis., and Chicago to various points in Oklahoma, except Westville, serving all intermediate points including St. Louis, and that at the time of hearing Nelsen Brothers held a permit authorizing so far as here pertinent, operation as a contract carrier (1) of canned goods (a) from Nebraska City, Nebr., to points in six States including Arkansas and [fol. 480] Oklahoma, (b) between Hamburg, Iowa, and Nebraska City, (c) from Grinnell and Atlantic, Iowa to Nebraska City, and (d) from Kansas City to Council Bluffs, Iowa, and six points in Nebraska.

Wright is authorized, so far as here material, to transport (1) sugar from Torrington, Swink, and Rocky Ford, Colo., to all points in Arkansas and Oklahoma, (2) fresh produce from points in Colorado to points in Arkansas and Oklahoma, and (3) canned goods, (a) from 10 points in Colorado to points in Oklahoma, (b) from Muskogee, Okla., to points in Colorado, (c) from Springdale and Lowell to points in Colorado, and (d) from Springdale to points in New Mexico on and north of U. S. Highway 66, and those in Nebraska on and west of U. S. Highway 83. Shipments of canned goods moving from Fort Smith and Westville to points in the western portion of Colorado could be interchanged with Loving at Muskogee. It maintains a terminal at Rocky Ford, and operates equipment daily between authorized points. It handles between 6,000,000 and 7,000,000 pounds of canned goods annually for several shippers, including a substantial volume of freight for Welch Grape Juice Company, of Springdale, and has received no complaints. It also transports a substantial volume of the other commodities described above. It has not handled any freight for the supporting shippers; however, it is willing to serve these shippers. In 1953, it solicited Steele and was advised that that shipper was shipping all of its traffic by private carriage. After the application was filed Wright advised Steele by letter or telegram in respect of the availability of its service, and received no response. The handling of shipments which require split-deliveries en route is a common practice of Wright. The carrier concedes that

under certain conditions it would not be able to handle a consolidated load of less-than-truckload traffic for Steele. For example, it could not handle a pool shipment of canned goods originating at Westville, Fort Smith, Springdale and Lowell and destined to one or more customers in Missouri, eastern Nebraska and western Nebraska.

Loving is authorized, so far as here pertinent, to tack certain authorities and transport the commodities here involved between points in Oklahoma, Kansas and Arkansas, on the one hand, and, on the other, points in Colorado on and east of U. S. Highway 87. It maintains terminals at Denver and Oklahoma City, and operates equipment daily to and from certain authorized points including those in the Tulsa area. It transports about 400,000 pounds of canned goods a month for certain shippers, including some freight for Welch Grape Juice Company, of Springdale, and provides multiple or split-delivery service. A truckload or a portion of a pooled load of less-than-truckload traffic destined to a point beyond its authorized territory would be interchanged with connecting carriers. For example, freight originating at Springdale and destined to points in the western portion of Colorado could be interchanged with Wright for delivery by the latter. Its representative [fol. 481] could not recall any shipments of freight handled for the supporting shippers; however, it is willing to provide service for these shippers on inbound and outbound traffic.

Buckingham Transportation, Inc., Buckingham Express, Inc., and Buckingham Transfer, Inc., hereinafter called the Buckingham companies, are authorized so far as here material, to provide through service in the movement of general commodities, over combined regular and irregular routes extending from Omaha, Nebr., and Kansas City to various points in Illinois, Iowa, Nebraska, Minnesota and North Dakota, and those in the western portion of South Dakota, and several points in Missouri and Colorado, including Denver. They handle both large and small shipments of the type of traffic here involved, including a substantial volume of canned goods, and consistently provide multiple delivery service. Traffic is interchanged with connecting carriers. Freight moving to or from points in



the eastern portion of South Dakota is interchanged with a connecting carrier at Sioux Falls, S. Dak. Freight is interlined at Kansas City with Best, Jones, and several other carriers. These carriers are unaware of any traffic handled for the supporting shippers; however, they are desirous of participating with connecting carriers in the movement of the traffic here involved.

Watson Bros. Transportation Co., Inc., hereinafter called Watson, is authorized to transport the commodities here involved and other traffic over regular routes extending from Minneapolis, Chicago, St. Louis and Kansas City, on the east, to a number of California points, on the west, via Denver, serving intermediate points in Illinois, Iowa, Missouri, Minnesota, Nebraska, Kansas, Colorado, New Mexico and Arizona. It maintains terminals at a number of points including Kansas City and St. Louis. Interchange traffic comprises about 60 percent of its volume of business. It handles the type of traffic here involved and provides multiple drop-off service. Trailers are interlined on shipments of truckload traffic. It has interchanged freight at Kansas City and St. Louis with several carriers including Campbell, M. & A., England Brothers, Frisco, and Jones. It is desirous of participating with these carriers in the movement of the supporting shippers' traffic. Its representative could not recall the last time it handled a shipment of canned goods which required delivery service at four or five points en route.

Frisco is a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. It is authorized to transport general commodities over regular routes roughly paralleling the rail lines of the railroad. Its routes extend (1) from Springfield, Mo., to a number of points in Missouri including St. Louis and Kansas City, (2) from Springfield to Baxter Springs, Kans., Oklahoma City, and Dallas, Tex., (3) from Springfield to Columbus, Miss., via [fol. 482] Memphis, and (4) from Springfield to Alma, Ark., via Lowell and Springdale, serving various intermediate points. It has agents at a number of points including two points within 20 miles of Springdale. It handles the type of traffic here involved, and provides multiple delivery service. It has some idle equipment. It

is desirous of serving the supporting shippers. It has no authority to serve Fort Smith or Westville. If a pool load of canned goods originated, for example, at Springdale and Fort Smith, the freight shipped from the latter point would have to be picked up and delivered to Frisco by another carrier. Moreover, if Frisco were requested to deliver a pooled load consisting, for example, of canned goods moving to several consignees, including about 3,000 or 5,000 pounds for a consignee at a point not served direct by that carrier, the latter portion of the shipment would be transferred to a connecting carrier for delivery by the latter.

Best is authorized to transport general commodities over regular routes extending from a number of points in Ohio, Indiana, Illinois and Missouri, including Kansas City, to Houston and San Antonio, Tex., Greenville, Miss., Shreveport, La., Memphis, and numerous points in Arkansas, serving intermediate points including Fort Smith, Springdale and Lowell. It maintains terminals at several points including Fort Smith and Kansas City. It handles a substantial volume of traffic between authorized points, and interchanges traffic with several connecting carriers at Texarkana, Ark.-Tex., Kansas City, and certain other points. It is desirous of handling the inbound and outbound traffic of the supporting shippers. Admittedly, this carrier could not provide a complete pickup service on a consolidated load of canned goods originating, for example, at Springdale and Westville, because it has no authority to serve the latter point direct. No direct service is provided by Best on traffic shipped from Arkansas points to points in Texas. This traffic is interchanged with connecting carriers at Kansas City or Texarkana. It is aware that canned goods is one of the lowest revenue producing commodities handled by motor common carriers.

East Texas Motor Freight Lines, Inc., hereinafter called Texas Freight, is authorized to transport general commodities over regular routes extending from Chicago to Houston, San Antonio, Fort Worth, and Port Arthur, Tex., and Shreveport, via Memphis, Little Rock, and Texarkana. It maintains terminals at several points including Dallas, Texarkana, St. Louis, and Little Rock, and has

several pieces of equipment stationed at each terminal. It operates daily schedules, and transports truckload and less-than-truckload shipments of canned goods and other freight. Traffic moving to and from Springdale, Westville, and Texas points is interchanged at Texarkana with several carriers including Best. Trailers are interlined with Best and other carriers. It is also able to interchange [fol. 483] inbound and outbound shipments of the supporting shipper's traffic with several carriers, including Best and Jones, at St. Louis, and with Jones at Little Rock. It offers, for example, second-morning delivery service from St. Louis and Memphis to Texas points. Its equipment is not operating to capacity. Some heavy loading freight is loaded and transported in the same vehicle with light loading freight, including tin cans, so as to increase the payload. It is desirous of participating in the movement of the supporting shippers' traffic.

Gillette Motor Transport, Inc., and its affiliate Western Truck Lines, Inc., hereinafter called Gillette and Western, respectively, operate a combined through service in the movement of general commodities over regular routes extending from Kansas City to a number of points in California via Dallas, and El Paso, Tex., serving intermediate points. These carriers have no authority to serve Westville or any point in Arkansas direct; however, they are able and willing to participate with connecting carriers, principally Jones at Dallas, in the movement of the supporting shippers' traffic. They operate daily schedules, and offer, for example, first-morning delivery service from Dallas to El Paso, and second-morning service from Dallas to points in Arizona and California. Their equipment is not operating to capacity.

Western Pacific Railroad Company, hereinafter called W. P., operates over rail lines extending from Salt Lake City, Utah, to San Francisco and San Jose, Calif., via Elko, Nev. The Denver and Rio Grande Western Railroad Company, hereinafter called D.R.G., operates over rail lines extending from Denver and Pueblo, Colo., to Salt Lake City. Great Northern Railway Company, hereinafter called G.N., operates over rail lines extending from Yankton, S. Dak., Sioux City, and Chicago to points in

Oregon and Washington via Minot, N. Dak. The Atchison, Topeka and Santa Fe Railway Company, hereinafter called Santa Fe, operates over rail lines extending from Chicago to points in California, Arizona, New Mexico, Texas, Louisiana and Colorado, serving intermediate points. These rail carriers operate freight schedules daily and provide drop-off service en route, and traffic is interchanged between these carriers and with other rail carriers. G.N. offers, for example, one-day service from Sioux City to points in Minnesota, North Dakota and Wisconsin, and Santa Fe offers, for example, next-morning delivery service from Dallas to El Paso, Tex., and second-morning service to points in Arizona and California. In 1957, Santa Fe participated in the movement of 19 carloads of canned goods from points in Arkansas and Oklahoma to California points, and 609 carloads of canned goods from points in California to points in Arkansas and Oklahoma. During the same period, W. P. participated in the movement of 41 carloads of canned goods from points in California to points in Arkansas, and one carload of beans, 20 [fol. 484] carloads of canned goods, and 29 carloads of sugar from points in California to points in Oklahoma. They have experienced a decline in traffic, despite large expenditures in operating facilities. These carriers have no authority to service Westville or any point in Arkansas; however, they are desirous of participating with connecting carriers in the movement of the inbound and outbound traffic of the supporting shippers.

As seen, Steele is shipping a substantial amount of canned goods from Springdale, Lowell, Fort Smith and Westville to a number of points in the States here involved. Some of this traffic is obtained from Cain at Springdale, and from Keystone at Fort Smith. It also ships tin cans and lids, can labels, salt, sugar, caustic soda, corrugated boxes, canned goods, and fresh fruits and vegetables from various sources of supply in the territory here involved to the four origin points described above. A substantial number of Steele's customers order canned goods in small less-than-truckload quantities, and since about 1948 Steele has been transporting the small-order freight in pool loads, in private carriage, and each shipment requires stops for

delivery at several points en route. Its equipment is also used for the movement of inbound freight. Since about June 1, 1958, shipper has also been using applicant under emergency and temporary authority for the movement of a portion of the small-order traffic and some inbound freight. Shipper's use of private carriage, and the service provided by applicant under emergency and temporary authority is based on its conviction that rail service is too slow and is otherwise unsatisfactory for the movement of any traffic handled by shipper, and that the existing motor carriers are unable to meet its transportation requirements on the pooled loads of the outbound traffic and on the inbound freight.

Since about June 1, 1958, Cain has made some shipments of canned goods from Springdale to customers at Chicago, Kansas City, and St. Louis, and it has received some inbound freight at its plant. If the proposed service were authorized, Cain would make an effort to sell and ship a substantial volume of canned goods to small-order customers in the State here involved. At the time of hearing, Keystone was shipping a fairly substantial volume of canned goods from its plant at Fort Smith to points in a number of States here involved, and it was receiving some inbound freight. If the proposed service were authorized, shipper would expand its sales efforts in the States here involved, primarily in respect of small-order traffic. Cain and Keystone also have the conviction that the existing rail and motor carriers are unable to provide adequate service on shipments of the small-order traffic.

True, the opposing rail and motor carriers operate daily between points in a portion of the territory here involved; however, the record indicates that the proposed service will be more responsive to shipper's transportation requirements. All things considered, the examiner concludes that the evidence warrants a grant of authority to the [fol. 485] extent hereinafter indicated, and it does not appear that such a grant will have any material adverse affect upon the operations of any other carrier.

The examiner finds that operation in interstate or foreign commerce by applicant as a contract carrier by motor vehicle, over irregular routes, under a continuing

contract or contracts with Steele Canning Company, of Springdale, Ark., Keystone Packing Company, of Fort Smith, Ark., and Cain Canning Company, Inc., of Springdale, Ark., of the commodities described and in the manner described in appendix A hereto, will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that a permit authorizing such operations should be granted; and that the application in all other respects should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By H. L. Hanback, Hearing Examiner.

(Signature) H. L. Hanback

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[fol. 486]

No. MC-117391

## APPENDIX A

- (1)—Canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois except Chicago, Ill., Indiana, Iowa, Kansas except Wichita, Kans., Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri except St. Louis, Kansas City, Springfield, and Joplin, Mo., Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma except Oklahoma City and Tulsa, Okla., Pennsylvania, Tennessee except Memphis, Tenn., Texas except Dallas and Fort Worth, Tex., Virginia, West Virginia, and Wisconsin, over irregular routes.
- (2)—Canned goods, and materials and supplies used in manufacturing, labeling, packing, and transporting canned goods, from the destination points described in (1) above, except those in Virginia, West Virginia and Wisconsin, to Springdale, Lowell, and Fort



Smith, Ark., and Westville, Okla., over irregular routes.

- (3)—Tin cans and lids from Chicago, Ill., to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., over irregular routes.
- (4)—Corrugated fibreboard boxes, from Memphis, Tenn., to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., over irregular routes.

#### RESTRICTIONS:

The operating authority described above shall be limited to a transportation service to be performed under a continuing contract or contracts (a) with Steele Canning Company, of Springdale, Ark., on traffic moving from and to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., (b) with Keystone Packing Company, of Fort Smith, Ark., on traffic moving from and to Fort Smith, and (c) with Cain Canning Company, Inc., of Springdale, Ark., on traffic moving from and to Springdale.

[fol. 487]

Recommended by H. L. Hanback,  
Hearing Examiner.

(Signature) H. L. Hanback

#### ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,  
Division 1, held at its office in Washington, D. C., on  
the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 1958.

No. MC-117391

#### E. L. REDDISH Contract Carrier Application

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact

and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

*It is ordered.* That upon full-compliance with all requirements of sections 215, 218, and 221(c) of the Interstate Commerce Act, with the rules and regulations thereunder, and with the requirements established generally and discussed at some length in *Contracts of Contract Carriers*, 1 M.C.C. 628, a permit be issued to applicant authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of the commodities described, and in the manner described, in the findings in said report.

*It is further ordered.* That the application in all other respects be, and it is hereby, denied.

*And it is further ordered.* That this order shall be effective on .....

By the Commission, division 1.

Harold D. McCoy, Secretary.

(Seal)

[fol. 488]

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC-117391

E. L. REDDISH Contract Carrier Application

Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities, (1) from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in 33 States, and (2) from points in 30 States to Springdale, Lowell, Fort Smith, and Westville, found not shown to be consistent with the public interest and the national transportation policy. Application denied.

*John H. Joyce and A. Alvis Layne* for applicant.

*John C. Ashton, Edward G. Bazelon, Carll V. Kret-singer, J. Max Harding, Hugh T. Matthews, E. L. Ryan, Jr., J. W. Durden, Roy L. Eyster, Jerry Prestridge, Marion F. Jones, Gerald A. Orscheln, Vernon M. Masters, Thomas D. Boone, G. F. Gunn, Jr. and Chester G. Hayes, Jr.,* for protestants.

#### REPORT OF THE COMMISSION—June 30, 1959

Division 1, Commissioners Murphy, Goff, and Webb

##### By Division 1:

Joint and separate exceptions were filed by certain protestants to the order recommended by the examiner, and applicant replied. Our conclusions differ from those recommended.

By application filed May 13, 1958, as amended, E. L. Reddish, of Springdale, Ark., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) of canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield, and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, [fol. 489] North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis), Texas (not including Dallas and Fort Worth), Virginia, West Virginia, and Wisconsin, and (2) of canned goods, and materials and supplies used in the manufacture of canned goods, from points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago for articles other than metal cans and lids), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield, and Joplin), Maryland,

Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis for articles other than boxes), and Texas (not including Dallas and Fort Worth), to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla. The proposed service would be limited to a transportation service to be performed under a continuing contract or contracts with Steele Canning Company, of Springdale, Keystone Packing Company, of Fort Smith, and Cain Canning Company, Inc., of Springdale, hereinafter called Steele, Keystone, and Cain, respectively. Southwest Railroad Association, Class I Rail Carriers in Western Trunkline Territory, and numerous motor carriers<sup>1</sup> oppose the application.

[fol. 490] The examiner recommended that the application be granted. On exceptions protestants assert that the examiner erred in concluding that a grant of the proposed authority would have no material adverse effect upon existing carriers and would be consistent with the public interest and the national transportation policy. Specifically, it is argued that, apart from evidence pertaining to rates, there is absolutely no evidence that protestants cannot satisfactorily perform the proposed service and that shippers' admitted dissatisfaction with protestants motor carriers' existing rate structure on less-than-truckload shipments does not constitute a statutory basis for the issuance of a permit. In reply applicant says that the conclusions

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<sup>1</sup> Frisco Transportation Company; Watson Brothers Transportation Company; Central Wisconsin Motor Transportation Company; The Chief Freight Lines Company; Campbell "66" Express, Inc.; Churchill Truck Lines, Inc.; Howard and James Nelson, doing business as Nelson Bros.; East Texas Motor Freight Lines, Inc.; Herrin Transportation Company; Western Trunk Lines, Limited; Gillette Motor Transport; Arkansas-Best Freight System, Inc.; Be-Mac Transportation Company; Red Cargo Freight Lines, Inc.; Merchants' Fast Motor Lines, Inc.; Wright Motor Lines; Loring Truck Lines; Buckingham Transportation, Inc.; Buckingham Express; Buckingham Transfer; Orscheln Bros. Truck Lines, Inc.; Southwest Freight Lines, Inc.; Freightways, Inc.; Missouri-Arkansas Transport Company; and L. A. Tucker Truck Lines.

and findings of the examiner are amply supported by the record. He urges that a grant will have no adverse effect on protestants, whereas a denial will disastrously affect shippers; that protestants' service is irregularly conducted and prohibitively priced; that protestants cannot provide the necessary multiple pickups and multiple deliveries; and that a denial of the application will force shippers to expand private carriage operations. Applicant contends that the 1957 amendments to the contract-carrier provisions of the Interstate Commerce Act, coupled with the Supreme Court's decision in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, in effect set contract carriage apart from common carriage as a "separate mode of transportation," and that in determining an application for contract-carrier-authority we must consider whatever distinct advantages contract carrier service may have over common carrier service, including the possible ability of [fol. 491] a contract carrier to offer service at a lower rate. He further argues that in determining contract carrier applications this Commission is limited in the issues which may be considered to those specifically set out in section 209(b) of the act; and that, in light of these criteria, he has demonstrated that a grant of authority would be consistent with the public interest and the national transportation policy.

The evidence adduced, the examiner's recommendation, the exceptions, and the reply have been considered. The examiner's statement of facts is correct in all material respects, and we adopt it as our own. The facts are repeated only insofar as is necessary for discussion of the issues.

Applicant holds no permanent motor carrier authority. On June 12, 1958, he had nine tractor-trailer units under long-term lease to Steele. Because of a strike of Steele's drivers, applicant obtained temporary authority to transport, under contract with Steele, certain of the involved commodities from and to numerous points which he here proposes to serve. The temporary authority is conditioned to expire upon final determination of this proceeding. Practically all of the outbound shipments were comprised of less-than-truckload shipments for delivery at several

points en route, including points in different States. For these small shipments, applicant assessed a rate computed on the basis of his truckload rate, with no extra charge for stopping in transit.

Steele operates a plant at Lowell and a warehouse at Springdale. In addition to manufacturing and shipping between 500,000 and 600,000 cases of canned fruits and vegetables annually, Steele, prior to the strike purchased [fol. 492] and distributed approximately 85 percent of Cain's production, or between 500,000 and 600,000 cases annually, and 75 percent of Keystone's production, or between 400,000 and 500,000 cases. The strike has caused Steele to curtail these purchases by about 10 percent. In addition, Steele makes substantial purchases from canners at Westville and Springdale. Steele takes title to the commodities at the plants of the suppliers, and selects the carrier for the initial movement to the customers and to its warehouse in Springdale. Steele ships a substantial volume of canned goods in straight truckload lots to the points in the States here involved; however, the majority of its outbound shipments, and this portion of its outbound traffic is increasing, are combined loads comprised of small volume orders of several customers requiring expeditious service. Often these loads are composed of shipments picked up at more than one of the plants of its suppliers. A movement normally requires up to six or more stops en route for delivery to consignees in two or more States. Shipper has customers at various points in the destination States and is continually expanding its sales area. Its customers maintain a low inventory, thus requiring shipper to make deliveries on short notice. In addition to controlling outbound movements, Steele obtains title to all inbound materials and supplies at the source of supply and selects the carrier for the inbound movements. It purchases necessary items used in the manufacture of canned goods at many points in the territory here involved.

Since 1948 Steele has conducted private motor carrier operations, and about 80 percent of its traffic has moved in [fol. 493] this way or, since its labor difficulties began, by applicant under temporary authority. Most of its remaining traffic has been transported by motor common carriers,



with most of the shipments being originated by Jones Truck Line, Inc., which does not oppose the application. Rail service has also been used to a limited extent. The motor common carriers provide service to authorized destination points and select the connecting carriers for joint-line movements to points beyond their authorized territory. Although it desires a single-line service to all points, Steele will continue to use the joint-line service of existing common carriers on truckload movements. It asserts that on less-than-truckload shipments existing carriers are unable to provide multiple pickup and multiple delivery service, and that their service is not expeditious. However, its support of the application is primarily predicated on its opinion that existing rates on less-than-truckload shipments are prohibitive. Because of the competitive situation, and the small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that it would be forced out of business if it had to ship the numerous small orders of canned goods, in less-than-truckload quantities, at less-than-truckload common-carrier rates, and that successful operations of its business necessitates the movement of this traffic in consolidated loads, either by private carriage or by for-hire motor carriers at truckload rates. Steele desires to terminate its private operations because of labor difficulties and to utilize applicant instead. It will enter into appropriate contracts if authority is granted. If the application [fol. 494] is denied shippers will continue to use private carriage without resorting to further common carrier service because such carriers' less-than-truckload rates are considered prohibitive.

Cain is willing to provide the volume of canned goods which will be required by Steele in the future; however, it is desirous of selling and shipping a substantial portion of its production to prospective customers at various points in the States here involved so as not to be dependent on one or more large customers for the sale of its products. Prior to the strike, it never sold directly to customers, the supplies not used by Steele having been sold to other canning companies in Arkansas and Oklahoma. These

companies picked up the freight at Cain's plant. Since the strike it has had several direct sales to customers at Kansas City, St. Louis, and Chicago, which were satisfactorily handled by Jones Truck Line. All inbound supplies are either furnished by Steele or by brokers who control the traffic. Cain fears that it will not be able to expand its sales area if it is forced to ship at less-than-truckload rates and that existing motor carriers will be unable to handle small shipments in combined loads. Admittedly, this shipper is not very familiar with the service provided by the existing motor carriers and supports applicant on inbound shipments so as to insure him a balanced operation and enable him to render a better service on outbound movements.

Keystone has an operation similar to that of Cain. However, that portion of its production which is not purchased [fol. 495] by Steele is sold by shipper and delivered by rail and motor carriers to customers at several points in the territory here involved. Existing service on truckload traffic is satisfactory but shipper is convinced that it would be unable to ship less-than-truckload traffic because of transportation costs. However, if the proposed service were authorized it would make an effort to obtain sales and ship the freight in loads requiring delivery at two or more points en route and at truckload rates for each shipment. Shipper has begun to operate two trucks in private carriage and will supplement its fleet if the application is denied and its small orders increase.

A number of motor carrier protestants presented evidence of their authorities and operations. These are discussed in detail in the examiner's report and need not be repeated here. By either direct or joint-line service motor protestants can provide service to substantially all the points involved herein. Each of the opposing motor carriers, except Nelson Brothers, is a common carrier and each operates a substantial amount of equipment suitable for the transportation of the commodities here involved. Although shippers have knowledge of the availability of service from several protestants, none of the protestants has participated in the involved traffic. All have expressed an interest in participating in this traffic either as initial

or connecting carriers on both inbound and outbound shipments. They have handled both large and small shipments of the type of traffic here involved and are willing to provide multiple pick up and delivery where authorized. They believe that until their service is tried and found wanting there is no justification for a grant of additional authority. [fol. 496] The Western Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, Great Northern Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company, in connection with other rail carriers, operate extensively throughout the territory. Canned goods constitute a substantial part of their traffic, and they have been experiencing a sharp decline in canned goods tonnage. To a limited extent they have participated in outbound movements of the supporting shippers' traffic, and to a greater extent they have handled inbound shipments of materials and supplies. They contend that they are able to provide needed service and that the shippers have failed to take full advantage of their facilities. They are particularly anxious to retain inbound traffic moving from many points in the territory applicant wishes to serve to the shippers' plants.

Applicant argues in his reply to exceptions that the 1957 amendments to certain sections of the act affecting contract carriage and the decision in the *Schaffer* case, *supra*, set contract carriage apart from common carriage as a separate mode of transportation, and that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11185 (Sub-No. 100), *J-T Transport, Inc., Extension—Columbus, Ohio, M.C.C.*, decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common carrier [fol. 497] service is a relevant matter which must be considered in disposing of contract carrier applications.

Section 209(b) of the act sets forth certain criteria which must be considered, among other things, in determining whether the issuance of a permit will be consistent

with the public interest and the national transportation policy. These are: (1) the number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon protesting carriers, (4) the effect of a denial on applicant and his supporting shipper, and (5) the changing character of the shipper's requirements. It should be noted, however, that these are not factors that must be considered exclusively. Other matters affecting the public interest and the national transportation policy must also be examined. See *J-T Transport case, supra*.

The first of the statutory enumerated factors is to be considered in relation to the question whether applicant intends to serve "one or a limited number of shippers," and is thus a bona fide contract carrier as defined in section 203(a)(15) of the act. We think that applicant, who proposes to limit his service to only three shippers, meets this particular requirement.

The next factor, the nature of the proposed service, requires a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. Shippers require a motor carrier service for the transportation of [fol. 498] less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stop-off-in-transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common carrier service on truckload shipments even if the application is granted.

Section 209(b) next requires us to determine the effect upon protesting carriers which a grant of authority to a contract carrier would have. It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J-T Transport, supra*.

Section 209(b) also requires us to consider the effect of a denial on applicant and its supporting shipper. Applicant is a new entrant into the field of motor transportation, and we think it clear that a denial of this application could not be said to affect him adversely. Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence [fol. 499] pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application.



The final matter which section 209(b) directs us to consider in determining contract carrier application is the effect which a denial would have upon the changing character of the shipper's requirements. This factor should be applied in two different situations. First, where a contract carrier is presently serving a shipper and the shipper's requirements change because, for example, it develops a new type of product or opens new markets, its need for a complete transportation service should be considered in determining whether an application should be granted. This situation is not present here, since this is applicant's first attempt to obtain permanent operating authority. Second, we must consider whether there is likelihood that shipper's transportation requirements will change at some future date in such a manner as to make the service proposed by a contract carrier applicant necessary. In the instant case there is no indication that the nature of the shipper's needs is likely to change so as to render existing common carrier service unsatisfactory.

There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied. [fol. 501] We find that applicant has failed to establish that the proposed operation will be consistent with the public interest and the national transportation policy; and that the application should be denied. An order denying the application will be entered.

Commissioner Webb concurs in the result.



[fol. 502]

BEFORE THE INTERSTATE COMMERCE COMMISSION, Division 1,  
Washington, D. C., A. D. 1959.

No. MC-117391

E. L. REDDISH Contract Carrier Application

ORDER—June 30, 1959

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

*It is ordered*, That said application, be, and it is hereby, denied.

By the Commission, division 1.

Harold D. McCoy, Secretary.

[fol. 503]

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. MC-117391

E. L. REDDISH Contract Carrier Application  
(Springdale, Ark.)

ORDER DENYING PETITIONS FOR RECONSIDERATION—  
December 16, 1959

Upon consideration of the record in the above-entitled proceeding, and of:

- (1) Petition of Contract Carrier Conference of the American Trucking Associations, Inc., dated August 14, 1959, for leave to intervene.
- (2) Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc., dated September 17, 1959, for leave to intervene.

- (3) Petition of applicant filed August 14, 1959, for reconsideration and oral argument.
- (4) Petition tendered August 14, 1959, by the Contract Carrier Conference of the American Trucking Associations, Inc., for reconsideration.
- (5) Reply dated September 2, 1959, by Watson Bros. Transportation Co., Inc., protestant, to petitions in (3) and (4) above.
- (6) Joint reply dated September 4, 1959, by Wright Motor Lines, Inc., Loving Truck Lines, Buckingham Transportation, Inc., Buckingham Express, Inc., Buckingham Transfer, Inc., and Buckingham Transportation, Inc., as operator of Des Moines Transportation Company, Inc., protestants, to the petitions in (3) and (4) above.
- (7) Joint reply filed September 14, 1959, by Southwest Railroad Association, Class I Rail Carriers in Western Trunkline Territory, protestants, to petitions in (3) and (4) above.
- (8) Joint reply dated September 16, 1959, by Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Herrin Transportation Company, Gillette Motor Transport, Inc., and Western Truck Lines, Ltd., protestants to petitions in (3) and (4) above.
- (9) Tendered reply dated September 17, 1959, by the Regular Common Carrier Conference of the American Trucking Associations, Inc., to petitions in (3) and (4) above.
- (10) Reply dated September 21, 1959, by L. A. Tucker Truck Lines, Inc., protestant, to petitions in (3) and (4) above.

[fol. 504] *It is ordered*, That petitioners in (1) and (2) above be, and they are hereby permitted to intervene in said proceeding with the right to appear and participate in all further proceedings therein;

*It is further ordered*, That the tendered petition in (4) above and the tendered reply in (9) above be, and they are hereby, accepted for filing;

*It is further ordered*, That the petitions in (3) and (4) be, and they are hereby, denied for the reasons (a) that the findings of Division 1 are in accordance with the evidence and the applicable law, and (b) that no sufficient cause appears, for reopening the proceeding for reconsideration or for oral argument.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 505]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS

FORT SMITH DIVISION

Civil Action No. 1531

ELVIN L. REDDISH, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, Defendants,

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING  
ASSOCIATIONS, INC., Intervening Plaintiff,

L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS. TRUCK  
LINES, INC., ARKANSAS-BEST FREIGHT SYSTEM, INC., EAST  
TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR  
TRANSPORT, INC., WESTERN TRUCK LINES, LTD., REGULAR  
COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCK-  
ING ASSOCIATIONS, INC., ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY, AND 31 OTHER CLASS I RAIL CARRIERS  
IN WESTERN TRUCK LINE TERRITORY, Intervening Defen-  
dants.

## OPINION—October 19, 1960

Before Matthes, Circuit Judge, and Miller and Young, District Judges.

Young, J.

This is an action before a three-judge district court to enjoin and set aside orders of the Interstate Commerce Commission which denied plaintiff, Elvin L. Reddish, permanent authority to operate as a contract carrier by motor vehicle in interstate commerce. 28 U.S.C. §§ 1336, 1398, 2284 and 2321 through 2325 inclusive. By statute, the action is against the United States, represented by the Attorney General, while the Interstate Commerce Commission is made a party by right. 28 U.S.C. § 2323 (1958).

The Contract Carrier Conference of the American Trucking Associations, Inc., intervened before the Commission, and in this action on behalf of the plaintiff. The Commission is supported, in turn, by six common motor carriers, 32 railroads, and the Regular Common Carrier Conference of the American Trucking Associations, Inc., all of whom intervened before the Commission and in this action in opposition to the authority sought by plaintiff.

[fol. 506] In its answer, the United States admitted all of the allegations of the complaint.<sup>1</sup> The United States filed a brief in this Court in support of its position that the orders of the Commission should be set aside and the cause remanded for further proceedings. Counsel for the Government also appeared at the hearing and presented oral argument. In summary, the Government's position is that the Court erred (1) in concluding that grant of the application would adversely affect the protesting carriers; (2) in concluding that denial of the application would not adversely affect the supporting shippers.<sup>2</sup>

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<sup>1</sup> Paragraph 12 of the complaint alleged: "The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 are erroneous and void as a matter of law for the reason that they are arbitrary and capricious and without foundation in substantial evidence in the record considered as a whole."

<sup>2</sup> Encompassed in the second point is the contention that the Commission erred in treating as irrelevant the injury to supporting

The Interstate Commerce Commission, in its answer, denied that its action in denying plaintiff the permit he requested was unlawful, and stated that the action it had taken was fully supported and justified by the record.

The trial examiner of the Commission found that the service proposed by plaintiff would be consistent with the public interest and the national transportation policy, and recommended that the authority requested be granted. Division 1 of the Commission, however, denied the authorization requested, although the trial examiner's findings of fact were adopted by the Commission as their own. The action of Division 1 was sustained by the full Commission, which held:

[fol. 507] "(a) that the findings of Division 1 are in accordance with evidence and the applicable law, and (b) that no sufficient cause appears, for reopening the proceeding for reconsideration or for oral argument."

This action was brought by plaintiff for judicial review of this denial by the Commission.

There is no material dispute as to the facts. They are as follows:

Plaintiff requests permanent authority to operate as a contract carrier for Steele Canning Company and Cain Canning Company of Springdale, Arkansas, and for Keystone Packing Company of Fort Smith, Arkansas. He proposes to handle pool-truck shipments of less-than-truck-load orders intended for delivery in 33 states, and to handle certain canning supplies on his return trips from 30 of these states. Steele Canning Company is the major shipper of the three that plaintiff proposes to serve. Steele normally purchases about 75% of the production of Cain and Keystone, which Steele in turn resells to the wholesale and retail market. Steele began transporting its own small

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shippers caused by the higher cost of common carrier service; erred in concluding that the supporting shippers would not be adversely affected by withholding from them a contract-carrier service meeting transportation needs which the existing common carriers do not adequately meet.

order loads in 1948. This operation increased as Steele's small order business increased, until the fleet of trucks operated by Steele numbered 29 in January of 1958. Throughout this period Steele handled most of its truckload shipments by common carrier, principally Jones Truck Line, Inc., of Springdale, Arkansas, who supports the plaintiff's application to handle the less-than-truckload orders.

Steele's less-than-truckload orders account for approximately 80% of its business, which it transported almost exclusively by its own private carriage until June of 1958, when a labor dispute interfered with such operations. Steele at that time prompted plaintiff to apply for authority to handle this operation as a contract carrier. In June 1958 the Commission granted plaintiff temporary operating authority substantially as requested by him. The service rendered by plaintiff under such authority was found by the trial examiner to be substantially similar to the private [fol. 508] carrier operations previously performed by Steele. The contract service rendered by plaintiff to Cain and to Keystone largely involves their sales to Steele, but both are interested in developing their own less-than-truckload business, which plaintiff would handle.

The three canners insist that the only satisfactory alternative to private carriage is contract carriage of the type plaintiff proposes to offer and which he has performed for them under temporary operating authority. Their business is intensely competitive and has a small margin of profit. Most small order accounts operate on small inventories, making it critical that their orders be filled promptly. Further, Steele has found that many of its customers have special unloading times and requirements which must be observed at risk of the loss of that business. Because of these facts and because of the scattered location of the small order customers throughout the 33 states named in plaintiff's application, these three canners insist that they would not be in a competitive position if forced to rely upon common carriers for delivery of less-than-truckload orders. Delays in "interlining" shipments, coupled with what the canners regard as "prohibitive" common carrier less-than-truckload rates, would, they say, place them at a disadvantage as to their competitors, who maintain their own fleets of



trucks. The canners intend to abandon their private carriage operations and, in effect, use plaintiff as though he were their shipping department.

When the trial examiner found that some less-than-truckload shipments which require delivery stops for a portion of the freight at one or two points enroute to final destination had been satisfactorily handled by common carrier, the traffic that the three canning companies propose giving plaintiff involves from three to ten stops, with six stops being approximately the average less-than-truckload pooled shipment. This business has not in the past been handled [fol. 509] by the protestant common carriers and, say the three shippers, will continue to be handled by private carriage if plaintiff's application is not granted, though the protestant common carriers insist that their experience indicates that they will receive some of this traffic if it is not handled by a contract carrier.

## I

The limits of permissible judicial review of the order of the Interstate Commerce Commission here in question are determined by Section 10(e) of the Administrative Procedure Act. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958). The appeal is upon the record made before the Commission and its order must be sustained if it is supported by substantial evidence when viewed on the record as a whole and if the action taken is within the scope of its lawful authority. *Universal Camera Corporation v. Labor Board*, 340 U.S. 474, 490 (1951). Plaintiff alleges that the order under review lacks substantive support for several findings and conclusions expressed by Division 1 in its report, and further alleges that the report applies a test not permitted by statute.

Our review of the record has convinced us that the plaintiff is correct in these contentions.

## II

In declaring the national transportation policy, Congress included the following goals:

"...to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . ." 54 Stat. 899 (1940), 49 U.S.C., preceding § 1 (1958).

We need not decide whether contract motor carriers are a separate "mode" of transportation from common motor carriers to hold, as we do, that the goal of the national transportation policy encompasses all modes and all carriers subject to regulation.

[fol. 510] A contract carrier by motor vehicle is defined by statute as:

"...any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . [other than common carriers], under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." 71 Stat. 411 (1957), as amended, 49 U.S.C. § 303(a)(15) (1958).

The Commission found that plaintiff would fit this definition, but upon its review of the entire case concluded:

"It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J-T Transport, supra*.

"There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates

of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied."

The applicable section of the Interstate Commerce Act provides:

"Subject to . . . [the provision against holding both a common carrier certificate and a contract carrier permit], a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be [fol. 511] consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers, [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that

shipper's requirements." 71 Stat. 411 (1957), 49 U.S.C. § 309(b) (1958).

There is no contention that plaintiff has not demonstrated his fitness and ability to meet the first two requirements for the issuance of a permit, and as is said in the Commission's opinion, the fifth matter for consideration is not involved. As shown above, the Commission found that the granting of the permit would have an adverse effect upon the protesting common carriers because such carriers could efficiently handle the business, and there was no adequate showing that the supporting shippers had a real need for the proposed service. Thus, the third and fourth criteria enumerated in the act are the only ones involved, and it is upon these conclusions that the Commission denied plaintiff a permit as not being consistent with the public interest and the national transportation policy.

The statutory enumeration of factors for Commission consideration in determining consistency with the public interest and national transportation policy specifically includes the effect that a denial of the permit would have upon the supporting shippers, but as interpreted by the Commission,

"...whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements."

We find no authority for limiting the inquiry as to the effect of a denial of a permit to a mere inquiry as to the adequacy of presently available service. Indeed, as applied by the Commission in this case, there is no distinction between this test and the test of proving public convenience and necessity that must be met by applicants for a common carrier certificate.

[fol. 512] Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application; the rec-

ord, the findings of the examiner, and the specific findings of fact stated by Division 1 in its report all indicate the contrary—the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized. It does not do to say that the record is devoid of any substantial showing of dissatisfaction by the shippers with existing service because the complaints are not substantiated by reference to specific instances, or to hold that the shippers failed to show that they had been unable to obtain reasonably adequate service upon request because existing common carriers, other than Jones, had been almost completely untried in recent years. The record clearly reveals that the shippers, particularly Steele Canning Company, are reasonably familiar with the services, including less-than-truckload rates, of the protestant shippers, and have not used them for the traffic in question because these services are inadequate.

Further, the “adequacy of existing service” test as applied by the Commission in this case in its determination of the effect upon supporting shippers of a denial of the permit is a test proscribed by the legislative history of the Interstate Commerce Act. In 1957 the Commission proposed to Congress several changes in the Act to enable it to better regulate contract carriers. As proposed, § 203(a) (15) of the Act [49 U.S.C. § 303(a) (15)] would have defined the term contract carrier by motor vehicle as meaning:

“...any person which engaged in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . , under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.”

[fol. 513] Section 209(b) [49 U.S.C. § 309(b)] would have been changed to insert the requirement “that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown”. The amendment

of the Interstate Commerce Act does not contain such language, however, and as amended by Public Law 85-163, 71 Stat. 411, the two sections read as previously quoted in this opinion.

Our study of the legislative history of this Act convinces us that the deletion of the willingness and ability test was at the specific protest of the contract carriers, some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S.Rep.No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law 85-163, 71 Stat. 411). See, *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959).

We do not believe that there is any difference between the "willingness and ability" test deleted by Congress from the bill proposed by the Commission and the "adequacy of service" test which the Commission said it applied in this case—a separate test, it maintains, from the one deleted. We believe that the Commission's own opinion in this case shows that it did apply the "willingness and ability" test:

"Applicant argues in his reply [referring to the 1957 amendments] that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11195 (Sub-No. 100) *J-T Transport, Inc., Extension—Columbus, Ohio*, M.C.C., decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found [fol. 514] that the availability of common carrier service is a relevant matter which must be considered in disposing of contract carrier applications."

The decision of the Commission in the *J-T Transport, Inc.* case was attacked in a proceeding instituted by that



applicant in the district court for the Western District of Missouri, Western Division, in the case of *J-T Transport Co., Inc., v. United States of America and Interstate Commerce Commission*. The three-judge court in that case handed down its opinion August 9, 1960. — Fed.Supp. —, setting aside the order of the Commission for wrongfully applying the new criteria prescribed by the 1957 amendment to the Interstate Commerce Act. This case was one of first impression in construing the new status of an applicant for a permit as contract carrier when opposed by common carriers on the ground that adequate service was already available by common carrier. In that case, the court discusses exhaustively the legislative history of the 1957 amendments and concludes at page — of Fed.Supp.:

"The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing service is adequate, the effect on existing protesting common carrier services is adverse. . . . The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section."

In this case, the only evidence of the adequacy of existing service to meet the transportation requirements of the supporting shippers came from the testimony of common carriers that they were willing and able to serve, though they had not been called upon by the shippers to do so in recent years as to the traffic in question; all the other testimony was to the effect that the existing service was considered inadequate by the shippers.

We do not believe that it was the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide. Sufficient tests and safeguards to control the granting of contract carrier permits are contained in the law to protect common carriers without the imposition by the Commission of a test which Congress deemed improper.

As the Court said in overruling the Commission in the *J-T Transport* case:

"Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial of the permit. The statute does not say, 'The permit shall be issued, unless an existing carrier will be adversely affected.' It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application."

### III

Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. Congress has declared one of the goals of our national transportation policy is to promote "economical" service.

We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting ship-[fol. 516] pers. Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded.

## IV

In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied.

Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier. As the Court said in the *J-T Transport* case:

"... a finding by the Commission that existing common carrier service is 'adequate to meet the reasonable transportation needs' of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is 'designed to meet the *distinct need* of each individual customer.' While existing *specialized services* of common carriers may very well be adequate to supply the shipper's '*reasonable transportation needs*', that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper."

## V

The orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 shall be set aside and their enforcement enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings in conformity with this opinion as may be proper.

[fol. 517]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION  
Civil Action No. 1531

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ELVIN L. REDDISH, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, Defendants,

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING  
ASSOCIATIONS, Inc., Intervening Plaintiff,

L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS. TRUCK  
LINES, INC., ARKANSAS-BEST FREIGHT SYSTEM, INC., EAST  
TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR  
TRANSPORT, INC., WESTERN TRUCK LINES, LTD., REGULAR  
COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCK-  
ING ASSOCIATIONS, INC., ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY, AND 31 OTHER CLASS I RAIL CARRIERS  
IN WESTERN TRUCK LINE TERRITORY, Intervening Defen-  
dants.

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JUDGMENT—October 19, 1960

Before Matthes, Circuit Judge, and Miller and Young,  
District Judges.

This opinion prepared by Judge Young and this day  
filed is hereby approved and adopted as the opinion of the  
Court, and pursuant thereto

It Is Hereby Ordered, Adjudged and Decreed that the  
orders of the Interstate Commerce Commission involved  
here be and are set aside as being unlawful and void, and  
the case is remanded to the Commission for further pro-

ceedings consistent with the views and rulings expressed in said opinion.

This October 19, 1960.

M. C. Matthes, Circuit Judge, Jno. E. Miller, District Judge, Gordon E. Young, District Judge.

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[fol. 518]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION  
Civil Action No. 1531

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ELVIN L. REDDISH, Plaintiff,  
and

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING  
ASSOCIATIONS, Inc., Intervening Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, Defendants,

and

REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCK-  
ING ASSOCIATIONS, INC., L. A. TUCKER TRUCK LINES, INC.,  
ORSCHELN BROS. TRUCK LINES, INC., ARKANSAS-BEST  
FREIGHT SYSTEM, INC., EAST TEXAS MOTOR FREIGHT LINES,  
INC., GILLETTE MOTOR TRANSPORT, INC., WESTERN TRUCK  
LINES, LTD., ATCHISON, TOPEKA & SANTA FE RAILWAY  
COMPANY, AND 31 OTHER CLASS I RAIL CARRIERS IN  
WESTERN TRUNK LINE TERRITORY, Intervening Defen-  
dants.

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NOTICE OF APPEAL OF INTERSTATE COMMERCE COMMISSION TO  
THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled civil action, appeals to the Supreme Court of the United States from the final judgment entered in this action on October 19, 1960. This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

[fol. 519]

II.

The Clerk of the District Court will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of plaintiff, filed January 27, 1960, with its Appendices "A", "B", "C", "D", and "E".
2. Motion of plaintiff for Temporary Restraining Order, filed January 27, 1960, with its attached affidavits of Walter L. Turnbow and Elvin L. Reddish.
3. Order of Court of January 27, 1960, granting Temporary Restraining Order.
4. Order of Court of April 15, 1960, granting leave to the Contract Carrier Conference of American Trucking Associations, Inc., to intervene as a plaintiff.
5. Complaint of Contract Carrier Conference, intervening plaintiff, filed April 15, 1960, with its appendices "A" and "B".
6. Order of Court of March 11, 1960, granting leave to L. A. Tucker Truck Lines, Inc., and Orscheln Bros. Truck Lines, Inc., to intervene as defendants.
7. Order of Court of March 28, 1960, granting leave to Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western



Truck Lines, Ltd., and the Regular Common Carrier Conference of the American Trucking Associations, Inc., to intervene as defendants.

8. Order of Court of April 15, 1960, granting leave to the Atchison, Topeka and Santa Fe Railway Company and 31 other Class I Rail Carriers in Western Trunk Line Territory, to intervene as defendants.

9. Answer to complaint of plaintiff, filed March 28, 1960 by defendant Interstate Commerce Commission.

[fol. 520] 10. Answer to complaint of plaintiff, filed April 4, 1960, by defendant United States of America.

11. Answer to complaint of plaintiff, filed March 11, 1960, by intervening defendants L. A. Tucker Truck Lines, Inc., and Orscheln Bros. Truck Lines, Inc.

12. Answer to complaint of plaintiff, filed March 28, 1960, by intervening defendants Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and the Regular Common Carrier Conference of the American Trucking Associations, Inc.

13. Answer to complaint of plaintiff, filed April 15, 1960, by intervening defendants the Atchison, Topeka & Santa Fe Railway Company and 31 other Class I Rail Carriers in Western Trunk Line Territory.

14. Order of Court of April 6, 1960, transferring case from Fayetteville Division to the Fort Smith Division of the Western District of Arkansas and scheduling oral arguments for 9:30 A.M. on June 6, 1960.

15. Plaintiff's Exhibit "A", received in evidence at hearing before the Court on June 6, 1960, being three certificates by the Secretary of the Interstate Commerce Commission, dated March 2, 1960, with respect to the record before the Interstate Commerce Commission in Docket Nos. MC-117391; MC-117391 (Sub-No. 1 TA); MC-117391 (Sub-No. 2 TA); MC-117391 R-1 and MC-117391 R-2, entitled E. L. Reddish, Contract Carrier Application.

16. Opinion of the Court, filed October 19, 1960.
17. Judgment of the Court, filed October 19, 1960.
18. This Notice of Appeal.

### III.

The following questions are presented by this Appeal:

[fol. 521] 1. Whether the District Court erred in holding that the enumeration in the 1957 amendments to Section 209(b) of the Interstate Commerce Act of five factors which the Commission is to consider in determining whether the grant of a motor contract carrier permit would be consistent with the public interest and the national transportation policy, is exclusive so as to preclude the Commission from considering the adequacy of existing common carrier service in relation to two of those factors, i.e., the effect of a denial upon a shipper and the effect of a grant upon a shipper and the effect of a grant upon the services of protesting carriers.

2. Whether the District Court erred as a matter of law by itself finding that the supporting shippers needed a specialized transportation service and that the services of existing carriers were inadequate to meet the shippers needs.

3. Whether the District Court erred in holding that Section 209(b) requires the Commission to consider the lower rates of a contract carrier in its evaluation of the effect of a denial of the permit upon the supporting shippers.

Robert W. Ginnane, General Counsel, Arthur J. Cerra, Assistant General Counsel, Attorneys for the Interstate Commerce Commission, Washington 25, D. C.

[fol. 522] PROOF OF SERVICE (omitted in printing).

[fol. 524]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION  
Civil Action No. 1531

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ELVIN L. REDDISH, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, Defendants,

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING  
ASSOCIATIONS, INC., Intervening Plaintiff,

L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS. TRUCK  
LINES, INC., ARKANSAS-BEST FREIGHT SYSTEM, INC., EAST  
TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR  
TRANSPORT, INC., WESTERN TRUCK LINES, LTD., REGULAR  
COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCK-  
ING ASSOCIATIONS, INC., ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY, AND 31 OTHER CLASS I RAIL CARRIERS  
IN WESTERN TRUNK LINE TERRITORY, Intervening Defen-  
dants.

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NOTICE OF APPEAL OF THE ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY, ET AL. TO THE SUPREME COURT OF THE  
UNITED STATES

I.

Notice is hereby given that The Atchison, Topeka &  
Santa Fe Railway Company, Chicago & North Western  
Railway Company, Chicago, Milwaukee, St. Paul & Pacific  
Railroad Company, Chicago, Rock Island & Pacific Rail-  
road Company, The Denver and Rio Grande Western  
Railway Company, Green Bay and Western Railroad Com-  
pany, Illinois Central Railroad Company, The Kansas City  
Southern Railway Company, Minneapolis, St. Paul & Sault  
Ste. Marie Railroad Company, Missouri Pacific Railroad

Company, St. Louis-San Francisco Railway Company, The Great Northern Railway Company, Northern Pacific Railway Company, Texas & Pacific Railroad Company, Texas, New Orleans Railroad Company, and Midland Valley Railroad Company, identified as Class I Rail Carriers in Western Trunk Line Territory, intervening defendants in the above-entitled matter, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on October 19, 1960.

[fol. 525] This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b).

## II.

Intervening defendants adopt the request concurrently made by the Interstate Commerce Commission for preparation and transmission to the Clerk of the Supreme Court of the United States the transcript of record in this cause, embracing within the adoption each item designated by the Interstate Commerce Commission to be included, and, as well, this Notice of Appeal.

## III.

The following questions are presented by this appeal:

1. Whether under the 1957 Amendments to Section 209(b) of the Interstate Commerce Act the District Court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.

2. Whether the District Court erred in holding that the Commission, in determining whether issuance of a permit under Section 209(b) is consistent with the public interest and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, even assuming the evidence of record before the Commission will support a finding that the lower rates result from economies and advantages inherent in the contract carrier's operation.

3. Whether the District Court when substituting its judgment for that of the Interstate Commerce Commission

in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

Respectfully submitted,

E. L. Ryan, Jr., Chicago, Rock Island & Pacific Railroad Company, LaSalle Street Station, 139 West Van Buren Street, Chicago 5, Illinois; Warner, Warner & Ragon, By H. P. Warner, Heartsill Ragon, Suite 522, Merchants National Bank Building, Fort Smith, Arkansas, Attorneys for Intervening Defendants, Class I Rail Carriers in Western Trunk Line Territory.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 528]

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION  
Civil Action No. 1531

ELVIN L. REDDISH, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, Defendants,

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING  
ASSOCIATIONS, INC., Intervening Plaintiff,

L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS. TRUCK LINES, INC., ARKANSAS-BEST FREIGHT SYSTEM, INC., EAST TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR TRANSPORT, INC., WESTERN TRUCK LINES, LTD., REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, AND 31 OTHER CLASS I RAIL CARRIERS IN WESTERN TRUNK LINE TERRITORY, Intervening Defendants.

NOTICE OF ARKANSAS-BEST FREIGHT SYSTEM, INC. ET AL. TO  
THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and Regular Common Carrier Conference of the American Trucking Associations, Inc., intervening defendants in the above-entitled matter, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on October 19, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

Intervening defendants adopt the request concurrently made by the Interstate Commerce Commission for preparation and transmission to the Clerk of the Supreme Court of the United States the transcript of record in this cause, embracing within the adoption each item designated by the Interstate Commerce Commission to be included, and, as well, this Notice of Appeal.

[fol. 529]

III.

The following questions are presented by this appeal:

1. Whether under the 1957 Amendments to Section 209(b) of the Interstate Commerce Act the District Court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.

2. Whether the District Court erred in holding that the Commission, in determining whether issuance of a permit under Section 209(b) is consistent with the public interest and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, even assuming the evidence of record before the Commission will support a finding that the lower rates



result from economies and advantages inherent in the contract carrier's operation.

3. Whether the District Court when substituting its judgment for that of the Interstate Commerce Commission in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

Respectfully submitted,

Rice, Carpenter & Carraway, By Roland Rice, Suite 618, Perpetual Building, 1111 E Street, N.W., Washington 4, D.C.; Callaway, Reed, Kidwell & Brooks, By Rollo E. Kidwell, Hugh T. Matthews, 2130 Fidelity Union Tower, Dallas 1, Texas; Harper, Harper, Young & Durden, By J. W. Durden, Thomas Harper, Kelly Building, P. O. Box 297, Ft. Smith, Arkansas.

[fol. 530] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 532] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 534]

**SUPREME COURT OF THE UNITED STATES**

**Nos. 714, 723 and 725—October Term, 1960**

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**ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,  
Appellants,**

**vs.**

**ELVIN L. REDDISH, et al.; INTERSTATE COMMERCE  
COMMISSION, Appellant,**

**vs.**

**ELVIN L. REDDISH, et al.; and ARKANSAS-BEST FREIGHT  
SYSTEM, INC., et al., Appellants,**

**vs.**

**ELVIN L. REDDISH, et al.**

---

**ORDER NOTING PROBABLE JURISDICTION—April 17, 1961**

**Appeals from the United States District Court for the  
Western District of Arkansas.**

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted and the cases are consolidated. Two hours are allotted for oral argument and the cases are set for argument immediately following Nos. 563 and 564.

**April 17, 1961**

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Office-Supreme Court, U.S.

**FILED**

**FEB 10 1961**

**JAMES E. BROWNING, Clerk**

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1960

No. ~~8-111~~ - 49

**THE ATCHISON, TOPEKA AND SANTA FE  
RAILWAY COMPANY;  
CHICAGO AND NORTH WESTERN  
RAILWAY COMPANY; et al.,**

*Appellants,*

*vs.*

**ELVIN L. REDDISH, et al.,**

*Appellees.*

Appeal from the United States District  
Court for the Western District of  
Arkansas, Fort Smith Division

**STATEMENT AS TO JURISDICTION**

**AMOS M. MATHEWS**

**JAMES W. NISBET**

280 Union Station Building,  
Chicago 6, Illinois,

**E. L. RYAN, JR.**

La Salle Street Station,  
Chicago 5, Illinois.

*Attorneys for Appellants.*

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1960

\_\_\_\_\_  
**No. ....**  
\_\_\_\_\_

**THE ATCHISON, TOPEKA AND SANTA FE  
RAILWAY COMPANY;  
CHICAGO AND NORTH WESTERN  
RAILWAY COMPANY; et al.,**

*Appellants,*

*vs.*

**ELVIN L. REDDISH, et al.,**

*Appellees.*

\_\_\_\_\_  
Appeal from the United States District  
Court for the Western District of  
Arkansas, Fort Smith Division

\_\_\_\_\_  
**STATEMENT AS TO JURISDICTION** }

The District Court's opinion is reported at 188 F. Supp. 160, the report of the Interstate Commerce Commission at 81 M.C.C. 35. The Commission is taking a separate and concurrent appeal, in *Interstate Commerce Commission v. Reddish*, from the same judgment from which this appeal is taken, and copies of the opinions below, attached to the Commission's jurisdictional statement, are incorporated herein by reference.



This action was brought by appellee Reddish under 28 U.S.C. §§ 1336, 1398, 2284, and 2321 to 2325, to set aside an order of the Interstate Commerce Commission.

The judgment of the District Court annulling the order was dated and entered October 19, 1960. Notice of appeal was filed in that Court by these appellants December 16, 1960.

Jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101 (b).

The following cases sustain the Court's jurisdiction: *Alton Railroad Co. v. United States*, 315 U.S. 15, 18-20 (1942); *United States v. Interstate Commerce Commission*, 337 U.S. 426, 432 (1949).

#### STATUTES INVOLVED

This appeal is concerned largely with the construction of sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. §§ 303(a)(15), 309(b), as amended in 1957, 71 Stat. 411. These are set forth in the Appendix hereto. The textual changes made by the 1957 amendment are shown in italics.

#### QUESTIONS PRESENTED

1. Whether under the 1957 amendments to section 209(b) of the Interstate Commerce Act the District Court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.

2. Whether the District Court erred in holding that the Commission, in determining whether issuance of a permit under Section 209(b) is consistent with the public interest

and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, even assuming the evidence of record before the Commission will support a finding that the lower rates result from economies and advantages inherent in the contract carrier's operation.

3. Whether the District Court when substituting its judgment for that of the Interstate Commerce Commission in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

### **STATEMENT OF THE CASE**

Appellant Interstate Commerce Commission by the order here involved denied an application by appellee Reddish for a permit as a contract carrier by motor vehicle under § 209(b) as amended in 1957. The District Court annulled the denial order and remanded the cause to the Commission for further proceedings consistent with the Court's opinion. The Commission, certain motor common carriers, and the railroads filing this jurisdictional statement, took separate appeals from the District Court's judgment. The appellant motor common carriers and railroads were protesting parties before the Commission and were intervening defendants supporting the Commission's order in the District Court. The United States filed a brief in District Court supporting Reddish.

### **THE QUESTIONS ARE SUBSTANTIAL**

This is a case of first impression. The amendments of 1957 were adopted after lengthy consideration by Congress, following the decision of this Court in *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956). Other mat-

ters of importance were also dealt with in the amendments in addition to those immediately arising from that decision. The District Court gave the amended sections a construction not in accord with their plain language and in conflict with principles laid down by this Court in construing similar statutes. It accomplished this result by disregarding the words of the amendments and by resorting to legislative history. The Court erred in going to legislative history, and, moreover, when this history is examined it does not support the Court's conclusions. The questions involved are of vital interest to all carriers and shippers and need to be decided by this Court.

#### CONSTRUCTION OF § 209(b)

Section 209(b), as amended in 1957 (see Appendix), authorizes issuance of a contract carrier permit upon proof that the proposed operation will be "consistent with the public interest and the national transportation policy." The section further provides that in determining this issue the Commission shall consider five criteria, among them "the effect which granting the permit will have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper." As will be shown hereinafter, these are familiar tests commonly applied in the regulation of carriers.

The Commission, upon ample and adequate evidence, determined that granting the permit would have an adverse effect upon the protesting carriers, that denial would not adversely affect the applicant, and that since the existing services of protesting carriers were adequate to meet the supporting shippers' needs denial would not adversely affect the shippers.

The first, and basic, reason assigned by the District Court for setting aside the order was that the statute does not authorize denial upon the ground that the services of existing carriers are adequate. 188 F. Supp. p. 165. The Court did not reach this conclusion by construing the plain words of the statute, which, as we will show, are clear and well understood terms heretofore construed by this Court in such fashion as to support the Commission. Instead, the Court abandoned the plain statutory terms and excavated from legislative history material which, it thought, made the order unlawful. In this the Court committed two errors: (1) It resorted to legislative history to construe a statute so plain on its face as not to be open to extrinsic construction; and (2) it misapplied the legislative history, which, even when resorted to, does not sustain the Court's conclusion.

The criterion of § 209(b), "the effect which denying the permit would have upon the . . . shipper" (or user of service) has long been a central and basic test to be resolved where entry into a regulated business requires government authorization. *And deciding that issue inextricably involves whether existing service is adequate, that is, whether additional service is needed.* In its first regulated entry case, *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266 (1926), involving railroad versus railroad competition, the Court said:

"[Congress] recognized . . . that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which bears the loss. . . ." (p. 277)

" . . . For invasion through new construction of territory adequately served by another carrier, like

the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest." (p. 278)

The statute there construed, § 1(18) of the Act, 49 U.S.C. § 1(18), required proof of "public convenience and necessity" before building a new line of railroad. No criteria of "public convenience and necessity" were specified in the statute, but the Court held that that phrase included some of the tests which have now been explicitly stated in the 1957 amendment. Thus what the Court said in the foregoing excerpts comprehends:

"... the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper. . . ."

The Court's statement summarizes the concepts of the "effect which denying" (or granting) "the permit would have upon the . . . shipper" (the public) in the event of "invasion of territory adequately served by another carrier." Thus the "effect upon the shipper" cannot be disassociated from the "adequacy of existing service;" it is impossible to assay the "effect upon the shipper" without considering the "adequacy of existing service."

In other cases the Court has also made it clear that the issue of "the effect which denying the permit would have upon the . . . shipper" is inseparable from or identical with the issue whether the services of existing carriers are adequate.<sup>1</sup>

<sup>1</sup> *Western Pacific Calif. R. Co. v. Southern Pacific Co.*, 284 U. S. 47, 52 (1931); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 392 (1932); *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 68-69 (1945); *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 90-91 (1957); *American Trucking Assns. v. United States*, 355 U.S. 141, 153 (1957).

Thus the Commission correctly held that in following the command of § 209(b) to "consider . . . the effect which denying the permit would have upon the . . . shipper," it must take into account the adequacy of existing service. And the District Court erred in holding, 188 F. Supp. p. 165, that the adequacy of service test "is a test proscribed by the legislative history" of the 1957 amendment to § 209(b).

#### LEGISLATIVE HISTORY

The District Court refused to give effect to the plain meaning of the terms of § 209(b) because it thought they were modified by legislative history. The Court erred in going to the legislative history at all since the well settled meaning of the specific criteria of § 209(b), as shown above, does not permit recourse to legislative history.<sup>1</sup> However, for the purpose of showing that the legislative history relied upon by the Court does not support the Court's conclusion, we now turn to that history (S. Rep. No. 703, 85th Cong., 1st Sess.).

As originally proposed in 1957 § 203(a)(15) would have defined a contract carrier as one engaged

" . . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers."

Section 209(b) as originally proposed would have required proof

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<sup>1</sup> *Morrisette v. United States*, 342 U.S. 246, 263 (1952); *Packard Motor Co. v. National Labor Relations Board*, 330 U.S. 485, 492 (1947); *Gemsco v. Walling*, 324 U.S. 244, 260 (1945); *Ex Parte Collett*, 337 U.S. 55, 61 (1949).



“... that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.”

These provisions were deleted after objection by the contract carriers and others. In the place of the proposed language of § 209(b) there were substituted the five criteria specified in the bill as passed; and the present § 203(a)(15) (see Appendix) replaced the proposed version. The Commission approved these deletions and substitutions.

From this history the Court concludes that the Commission lacks power to deny Reddish's application on the ground that denial will not adversely affect the shippers because the existing services of protesting carriers are adequate. It is plain that the Court erred in so holding.

It is of course true that the deleted provisions would have authorized the Commission to deny the Reddish application. But it does not follow that the Commission lacks this power under the bill as passed. Actually the amended act with the five criteria of § 209(b) confers much broader discretion than the proposed language. The original terms would have required an *automatic* denial if it appeared that common carriers were at the time of the hearing or at some appropriate future time willing and able to provide the service needed. As passed the Act does not require automatic denial, but it clearly does grant administrative discretion on a more comprehensive scale to deny an application in a proper case where, as here, authorization would adversely affect existing carriers and would not adversely affect shippers because existing service is adequate. The substitution of administrative discretion within the five criteria for the automatic denial originally proposed does not mean that the Commission is powerless to deny an application in a proper case under the specified criteria.

The whole tenor of the legislative history is against the Court's conclusion. Summing up the purpose of the bill as finally presented and passed Report No. 703 said in its last paragraph:

"Your committee is of the opinion that the public interest in a sound transportation system, and *particularly in a stable and adequate system of common carriage*, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed." (Emphasis supplied)

Assuredly in the light of that declaration it cannot be said that the Senate Committee intended to shackle the Commission in the fashion determined by the Court.

#### RATES QUESTION

The Commission found that the shippers' dissatisfaction with the less-than-truckload rates of motor common carriers is not a sufficient basis to justify grant of the application under the evidence in this case. The District Court agreed that the prospect of lower contract carrier rates is not necessarily determinative in a case of this type. But the Court held that in view of its earlier conclusions, which we have discussed above, the Commission had failed to give the rate matter adequate consideration. It is clear that the Court did not make the rate question an independent ground for annulling the order, but that what the Court said about this issue was dependent upon and interlocked with its conclusion as to the construction of the Commission's statutory authority. The case therefore cannot be decided without resolving the issue of the proper construction of § 209(b).

In this connection it is noteworthy that this Court equated, as in the interest of the shipping public, denial

based on adequacy of existing service with denial based on proposed rate-cutting, in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, *supra*, 270 U.S. 266, 278.

#### EVALUATIONS OF THE EVIDENCE

In division IV of its opinion the Court concluded, upon its own examination of the evidence, that the Commission erred (1) in deciding from the evidence that granting the application would have an adverse effect upon the protesting common carriers, and (2) in failing to give consideration to evidence of special services which could not be supplied by a common carrier. The Court does not cite any evidence to support its conclusions. In the absence of anything more than the Court's recital of its own conclusions it is clear that the Court has not given adequate reasons to overturn the Commission's findings and actions with which the Court disagrees. Moreover, these considerations all turn upon and are interlocked with the question of statutory construction.

#### CONCLUSION

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

AMOS M. MATHEWS

JAMES W. NISBET

280 Union Station Building,  
Chicago 6, Illinois.

E. L. RYAN, JR.

La Salle Street Station.  
Chicago 5, Illinois.

*Attorneys for Appellants.*

## APPENDIX

Sections 203(a)(14)(15) and 209(b) of the Interstate Commerce Act, 49 U. S. C. § 303(a)(14)(15), 309(b).

Sec. 203(a)(14). The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

Sec. 203(a)(15) as amended in 1957.

(15). The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Former § 203(a)(15)

(15). The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) of this section and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

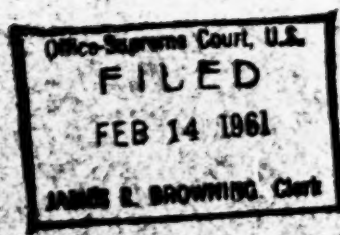
Sec. 209(b) as amended in 1957. Parts added by the 1957 amendment are shown in italics. 71 Stat. 411.

§ 209(b). Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, *including terms, conditions and limitations respecting the person or persons and the number or class thereof*

*for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6) of this title: Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any permit issued on or before August 22, 1957 which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15) of this title, as in force on and after August 22, 1957.*



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No. ~~4022~~ **53**

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**In the Supreme Court of the United States**

**October Term, 1960**

**INTERSTATE COMMERCE COMMISSION, APPELLANT**

**v.**  
**ELVIN L. REDDICK, JR. AL., APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF ARKANSAS—FORT SMITH DIVI-  
SION**

**FOUNDERIAL STATEMENT**

**ROBERT W. GERRARD,**  
Special Counsel,  
**ARTHUR J. GERRARD,**  
Assistant Counsel General,  
Interstate Commerce Commission,  
Washington 25, D.C.

**FEBRUARY, 1961**

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1960

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No. —

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**INTERSTATE COMMERCE COMMISSION, APPELLANT**

**v.**

**ELVIN L. REDDISH, ET AL., APPELLEES**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF ARKANSAS—FORT SMITH DIVI-  
SION**

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## **JURISDICTIONAL STATEMENT**

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### **OPINIONS BELOW**

The opinion of the United States District Court for the Western District of Arkansas is reported at 188 F. Supp. 160 and is set forth in Appendix A to this Statement. The report of the Interstate Commerce Commission is printed at 81 M.C.C. 35 and is set forth as Appendix C to this Statement.

### **JURISDICTION**

This suit was brought under 28 U.S.C. 1336, 1398, 2284, and 2321 to 2325, inclusive, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court, attached to this State-

ment as Appendix B, was entered on October 19, 1960, and notice of appeal was filed in that court by the Commission on December 16, 1960.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following decisions: *American Trucking Associations, Inc. et al. v. Frisco Transportation Company*, 358 U.S. 133, and *American Trucking Associations, Inc. et al. v. United States et al.*, 364 U.S. 1.

#### STATUTES INVOLVED

The provisions of sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended, 49 U.S.C. 303(a)(15) and 309(b), are set forth in Appendix D.

#### QUESTIONS PRESENTED

1. Whether the District Court erred in holding that the enumeration in the 1957 amendments to Section 209(b) of the Interstate Commerce Act of five factors which the Commission is to consider in determining whether the grant of a motor contract carrier permit would be consistent with the public interest and the national transportation policy, is exclusive so as to preclude the Commission from considering the adequacy of existing common carrier service in relation to two of those factors, i.e., the effect of a denial upon a shipper and the effect of a grant upon the services of protesting carriers.

2. Whether the District Court erred as a matter of law by itself finding that the supporting shippers

needed a specialized transportation service and that the services of existing carriers were inadequate to meet the shippers needs.

3. Whether the District Court erred in holding that Section 209(b) requires the Commission to consider the proposed lower rates of an applicant for a contract carrier permit in its evaluation of the effect of a denial of the permit upon the supporting shippers.

#### STATEMENT

This case involves an application for contract carrier authority to transport canned goods for three shippers,<sup>1</sup> from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to numerous points in 33 States, and of materials and supplies used in the manufacture of canned goods from 30 of these States to the 4 named points in Arkansas and Oklahoma. Prior to the grant of temporary authority because of a strike of Steele's drivers in 1958, 80 percent of its traffic had been transported by Steele in private carrier operations. In addition to manufacturing and selling its own canned goods, Steele purchases and distributes about 75 percent of Cain's and Keystone's annual production, taking title at the suppliers' plants and arranging delivery. Steele supported the application because it desired a single-line service to all points. Although existing service of common carriers had been almost completely untried in recent years, Steele asserted that on less-than-truckload shipments existing common carriers are

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<sup>1</sup> Steele Canning Co., Cain Canning Co., Inc., and Keystone Packing Co.



unable to provide expeditious stopping in transit service for multiple pickups and deliveries, and that existing less-than-truckload rates are prohibitive. Cain and Keystone, although selling most of their annual production to Steele, supported the application upon a desire to establish a sales area by shipping their traffic in less-than-truckload lots to prospective customers at lower contract carrier rates. While there were no complaints about defects in existing inbound common carrier service, inbound authority was supported merely to enable Reddish to conduct a balanced operation.

A number of motor carrier protestants presented evidence of their authorities and operations. By either direct or joint-line service, they can provide service to substantially all points involved in the application. Each of the opposing motor common carriers operates a substantial amount of equipment suitable for the transportation of canned goods and renders a daily service to other manufacturers of the same or similar commodities. Although Steele, Cain and Keystone have knowledge of the availability of service from the protesting motor carriers, who are willing to provide multiple pickups and deliveries en route, none of the protestants has participated in the involved traffic.

The railroad protestants operate extensively throughout the territory sought to be served by Reddish. Canned goods constitute a substantial part of their traffic, and they have been experiencing a sharp decline in canned goods tonnage. They have partici-

pated in outbound movements of the supporting shippers' traffic, but to a greater extent have handled inbound movements of materials and supplies. They contended that they are able to provide needed service and that the shippers have failed to take full advantage of their facilities and services.

The hearing examiner recommended a grant of the application finding that the service proposed would be consistent with the public interest and the national transportation policy.

Upon exceptions to the examiner's recommended report and order, and replies thereto, the Commission's Division 1 issued its report and order (81 M.C.C. 35, being Appendix C, *infra*, pp. 18a-30a) disapproving the examiner's recommendation and denying the application for the stated reason that "applicant has failed to establish that the proposed operation will be consistent with the public interest and the national transportation policy." (81 M.C.C. at 43, app. C, *infra*, p. 30a). The Commission made numerous subsidiary findings supporting its conclusion. (81 M.C.C. at 40-42, app. C, *infra*, pp. 26a-30a.)

Appellee Reddish timely filed a petition for reconsideration and oral argument to which the protesting rail and motor carriers replied. In addition the Contract Carrier Conference and the Regular Common Carrier Conference of the American Trucking Associations, Inc., each filed petitions for leave to intervene. The Contract Carrier Conference also sought reconsideration. By order dated December 16, 1959, the full Commission granted both petitions for leave

to intervene and denied the petitions for reconsideration.

Appellee Reddish then instituted an action in the District Court to set aside the report and orders of the Commission. By orders of the District Court the Contract Carrier Conference of the American Trucking Associations, Inc., was permitted to intervene as a plaintiff. The District Court also permitted 7 of the motor carrier protestants, 32 rail carrier protestants in Western Trunk Line Territory and the Regular Common Carrier Conference of the American Trucking Associations, Inc., to intervene as defendants.<sup>2</sup>

On October 19, 1960, the District Court rendered its opinion (Appendix A, *infra*, pp. 1a-15a), and judgment (Appendix B, *infra*, pp. 16a-17a), setting aside the Commission's orders and enjoining their enforcement and remanding the cause to the Commission for such further proceedings in conformity with its opinion as may be proper. This appeal followed.

### THE QUESTIONS ARE SUBSTANTIAL

Although this is a companion case to *Interstate Commerce Commission v. J-T Transport, Inc., et al.*, No. 563, October Term 1960, now pending before this Court on direct appeal, distinct and crucial questions are presented here which are not before this Court

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<sup>2</sup> The Department of Justice, representing the United States of America, confessed error in its Answer and actively argued for reversal of the Commission's order on the grounds that the Commission failed to consider the question of the applicant's proposed lower rates and that the order was not supported by substantial evidence.

in the *J-T* case.<sup>3</sup> It presents the broad and important question of whether Congress, in the 1957 amendments to the motor contract carrier provisions of the Interstate Commerce Act, has required the Commission to issue a contract carrier permit whenever a shipper expresses a desire for contract carrier service because of lower rates, without regard to the fact that existing motor common carriers hold appropriate authority and are able and willing to furnish adequate service. The resolution of this issue will determine whether a significant volume of traffic which could be efficiently and adequately handled by existing common carriers is to be automatically allocated to motor contract carriage simply because the shippers desire lower rates and threaten to resort to private carriage if a permit is not granted.

The 1957 amendments to Sections 203(a)(15) and 209(b) of the Act were the aftermath of this Court's decision in *United States v. Contract Steel Carriers*, 350 U.S. 409, 412 (1956), that "a contract carrier is free to aggressively search for new business within the limits of its license." As noted by the House Committee on Interstate and Foreign Commerce (H.R. Rep. 970, 85th Cong., 1st Sess. (1957) p. 3), "Freedom to solicit customers without restriction as to specialized service obliterates the distinction which Congress intended to make between common and contract carriers, and opens the door to unjust discrimination among shippers." Accordingly, Congress re-

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<sup>3</sup> The Court may desire to consolidate these two cases for joint disposition because of the inter-relation of legal issues involved.

defined the term "contract carrier by motor vehicle" in Section 203(a)(15) as "any person which engages in transportation by motor vehicle \* \* \* under a continuing contract with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." At the same time, Section 209(b) was amended to empower the Commission to limit the number of persons which can be served by a contract carrier.

Prior to the 1957 amendments, Section 209(b) authorized motor contract carrier operations found to be "consistent with the public interest and the national transportation policy." The 1957 amendments added the following language:

In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.

This case arises out of the quoted amendment, and its legislative history.

The Commission denied Reddish's application, concluding (App. C, *infra*, pp. 27a-29a, 81 MCC at

41-42) (1) that "Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries," (2) that the "protesting carriers are authorized to serve the origin points involved and \* \* \* numerous points in the vast 33-State destination territory \* \* \*," and "they are willing to make multiple pickups and they offer stopoff-in-transit delivery service," (3) that "the service required by the shippers [is in no] way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities \* \* \* and \* \* \* could be performed by protesting common carriers as well as by applicant," (4) "that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant," (5) "In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

In so holding, the Commission stated "There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract-carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. \* \* \* their support of this application rests entirely upon a desire to obtain



lower rates" which " \* \* \* is not a sufficient basis to justify a grant of authority to a new carrier." (App. C, *infra*, pp. 29a-30a.)

1. The court below clearly erred in holding that the five specified criteria listed in Section 209(b) are the exclusive factors which the Commission must consider in determining contract carrier applications and preclude the Commission's consideration of the adequacy of existing common carriers' service in evaluating the effect which granting the permit would have upon the services of protestant common carriers, and the effect which denying the permit would have upon the supporting shippers.

The court below, in interpreting the 1957 amendments, referred to the *J-T Transport* case<sup>\*</sup> as " \* \* \* one of first impression in construing the new status of an applicant for a permit as contract carrier when opposed by common carriers on the ground that adequate service was already available by common carrier," and which "set aside the order of the Commission for wrongfully applying the new criteria prescribed by the \* \* \* amendments." Clearly, the court below was of the same view as the court in *J-T* that the 1957 amendments, which had originated in the Congressional belief that this Court's *Contract Steel Carriers* decision gave too broad a scope to motor contract carriage, have in yet another way greatly enhanced the role of contract carriage at the expense of common carrier transportation. Not a word in the legislative history of the 1957 amendments reflects any

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<sup>\*</sup> *J-T Transport, Co., Inc. v. United States*, 185 F. Supp. 338.

Congressional understanding that this was their purpose.<sup>3</sup>

The decision finds such a deliberate and drastic change in the national transportation policy by the following deduction, which we believe to be erroneous. The Commission had proposed an amendment to Section 209(b) that a contract carrier permit could be issued only upon an affirmative showing by the applicant "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." As was noted by the court below, during the 1957 hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st. Sess., entitled *Surface Transportation—Scope of Authority of I.C.C.* (p. 22) the Commission proposed deletion of its own proposal "because of the very difficult burden of proof that would be imposed on applicants." We submit that sparing contract carrier applicants the burden of proving that existing common carriers are unwilling or unable to provide a needed service, does not reflect a Congressional purpose that contract carrier permits shall be issued without regard to affirmative evidence of the adequacy of existing common carrier service

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<sup>3</sup> In recommending passage of the amendments (S. 1384), the Senate Committee on Interstate and Foreign Commerce concluded (Senate Rept. No. 703, 85th Cong., 1st Sess., July 24, 1957, p. 7):

"Your Committee is of the opinion that *the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage*, in the light of the national transportation policy, require that the bill, as amended be passed." [Emphasis supplied.]

and the willingness and ability of existing common carriers to provide the service required by the supporting shippers which is introduced in the record by the protesting carriers. Nothing in the legislative history of the amendments suggests that Congress even contemplated such a drastic change in the relative roles of motor contract and motor common carriage.\*

We submit that the adequacy of existing motor carriers' service is obviously pertinent in determining the effect of a denial upon the shipper—one of the factors which the Commission admittedly must consider. The national transportation policy, which is the yardstick by which the correctness of the Commission's action will be measured, *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88, could

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\*To the contrary, the General Counsel for the Contract Carrier Conference of American Trucking Associations, Inc., the author of the enumerated factors which were inserted in Section 209(b) told the Senate Subcommittee (Senate Hearings, *supra*, pp. 299-300) " \* \* The suggestion that we have made, both before this Committee and before the Commission would limit contract carriers rather than provide for any expansion, \* \* \*. We do not suggest any change in that standard (a permit shall be granted if it is shown that the service proposed is consistent with the public interest and the national transportation policy). The only thing we have suggested in that connection is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, \* \* \* the primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both these matters should be taken into consideration \* \* \*."

not be carried out if the Commission were required to close its eyes to any matter which might affect the good of the national transportation system as a whole and grant contract carrier permits merely because certain shippers desire to obtain transportation at lower rates.

2. The District Court's opinion (App. A, *infra*, p. 14a) rejects the Commission's finding that the service of existing common carriers is adequate to meet the reasonable transportation needs of the shippers, and substitutes its view that the shippers require a special service and the lower rates of such a service, which, in the court's view, cannot be supplied by existing common carriers. Clearly, the court below was of the view that the Commission, in weighing the conflicting evidence, may no longer reject general assertions of inadequacy of existing service, but must grant a contract carrier permit regardless of positive evidence by protestants of adequacy of service, merely because shippers desire lower rates or threaten to resort to private carriage.

By Section 209(b), Congress has empowered the Commission to determine "the nature of the proposed service." We submit that this clear usurpation of the Commission's proper function of weighing the evidence is beyond the powers of a reviewing court. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-536; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *Gray v. Powell*, 314 U.S. 402. Proper administration of the Act requires that the Commission, not the reviewing court, make this

critical and difficult determination of whether there has been proposed a specialized service designed to meet special needs of the supporting shippers.

3. The court below erred when it rejected the Commission's conclusion that a shipper's desire to obtain lower rates for a service which is being adequately rendered by existing carriers is not a sufficient basis to justify a grant of new authority.<sup>7</sup> Without citation of judicial precedent or statutory authority,<sup>8</sup> the court below holds that the 1957 amendments overturn this long-established principle. Under the lower court's concept, since Reddish's lower rates result from "economies and advantages inherent in contract carrier operations", the national transportation policy's goal to promote "economical service" requires the Commission to consider such lower rates in its evaluation, under Section 209(b), of the effect of a denial of a permit upon the supporting shippers. This was error. There is not a scintilla of evidence in the record which would even remotely establish

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<sup>7</sup> The Commission has consistently held that the level of rates is not a proper matter for consideration in application proceedings for motor common and contract carrier authority, as well as in proceedings for unification of motor carriers. See, e.g., *Wellspeak Common Carrier Application*, 1 M.C.C. 712, 715-716 (1937); *Ingham Brokerage Inc., Ext.-Automotive Parts*, 12 M.C.C. 607, 610-611 (1939); *Rock Island M. Transit Co.—Purchase—White Line M. Frt. Inc.*, 5 M.C.C. 451, 457 (1938); Cf., *Railway Express Agency v. United States*, 153 F. Supp. 730, 741, affirmed, 355 U.S. 270; *Atlanta-New Orleans Mtr. Frt. Co. v. United States*, 10 F.C.C. par. 80,886 (U.S.D.C. N.D.-Ga. 1953).

<sup>8</sup> The question of rates was not even mentioned in the 1957 amendments or its legislative history and obviously was given no consideration by Congress.

that the proposed lower rates would be made feasible through more efficient and economical operation by Reddish.

4. We submit that whether Congress intended to make a significant change in the relative roles of motor common and contract carriage, or to convert contract carrier application proceedings into rate proceedings with the emphasis placed on the alleged lower rates of a contract carrier applicant, should be determined by this Court.

The practical importance of this case arises from the fact that a substantial diversion of traffic to contract carriage could, as the Chairman of the Commission testified before the Senate Subcommittee in 1957 (Hearings, *supra*, p. 22) "seriously impair (the ability of common carriers) to render adequate service to the general public, particularly to the small shippers who depend almost entirely upon common carrier transportation, and seldom have enough business to justify entering into a contract with a contract carrier."

Since the 1957 amendments, the Commission has decided 16 contract carrier applications inconsistently with the holdings of the lower courts in this case and in *Interstate Commerce Commission v. J-T Transport Co., Inc., et al.*, No. 563, October Term 1960, now pending before this Court on appeal. It has pending before it at least 40 cases involving the same issues. To the questions presented in the *J-T Transport Co.* case, this case adds the issue of the extent to which the Commission must give decisive weight to the lower rates proposed by an applicant for a contract carrier permit. In *J-T Transport Co.*, the protesting



common carrier was engaged in performing the same highly specialized transportation service with special equipment as was proposed by the applicant. Here, the applicant seeks to perform a commonplace service in the transportation of canned goods in standard equipment, such as many motor carriers perform. Taken together, the two cases present effectively the issues which have arisen as to the proper interpretation of the 1957 amendments.

### CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such importance as to require plenary consideration, with briefs and oral argument for their resolution.

Respectfully submitted.

ROBERT W. GINNANE,  
*General Counsel,*

ARTHUR J. CERRA,  
*Assistant General Counsel,*  
*Interstate Commerce Commission,*  
*Washington 25, D.C.*  
*Attorneys for the Interstate Commerce*  
*Commission.*

**APPENDIX A**  
**IN THE UNITED STATES DISTRICT COURT,**  
**WESTERN DISTRICT OF ARKANSAS, FORT**  
**SMITH DIVISION**

**Civil Action No. 1531**

**ELVIN L. REDDISH, PLAINTIFF**

**v.**

**UNITED STATES OF AMERICA AND INTERSTATE COM-**  
**MERCE COMMISSION, DEFENDANTS**

**CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCK-**  
**ING ASSOCIATIONS, INC., INTERVENING PLAINTIFF**

**L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS.**  
**TRUCK LINES, INC., ARKANSAS-BEST FREIGHT SYS-**  
**TEM, INC., EAST TEXAS MOTOR FREIGHT LINES, INC.,**  
**GILLETTE MOTOR TRANSPORT, INC., WESTERN TRUCK**  
**LINES, LTD., REGULAR COMMON CARRIER CONFERENCE**  
**OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,**  
**ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,**  
**AND 31 OTHER CLASS I RAIL CARRIERS IN WESTERN**  
**TRUCK LINE TERRITORY, INTERVENING DEFENDANTS**

**BEFORE MATTHES, Circuit Judge, and MILLER and**  
**YOUNG, District Judges.**

**YOUNG, J.**

This is an action before a three-judge district court to enjoin and set aside orders of the Interstate Commerce Commission which denied plaintiff, Elvin L. Reddish, permanent authority to operate as a contract carrier by motor vehicle in interstate commerce. 28 U.S.C. §§ 1336, 1398, 2284 and 2321 through 2325 inclusive. By statute, the action is against the United States, represented by the Attorney General, while the

Interstate Commerce Commission is made a party by right. 28 U.S.C. § 2323 (1958).

The Contract Carrier Conference of the American Trucking Associations, Inc., intervened before the Commission, and in this action on behalf of the plaintiff. The Commission is supported, in turn, by six common motor carriers, 32 railroads, and the Regular Common Carrier Conference of the American Trucking Associations, Inc., all of whom intervened before the Commission and in this action in opposition to the authority sought by plaintiff.

In its answer, the United States admitted all of the allegations of the complaint.<sup>1</sup> The United States filed a brief in this Court in support of its position that the orders of the Commission should be set aside and the cause remanded for further proceedings. Counsel for the Government also appeared at the hearing and presented oral argument. In summary, the Government's position is that the Court (sic. Commission) erred (1) in concluding that grant of the application would adversely affect the protesting carriers; (2) in concluding that denial of the application would not adversely affect the supporting shippers.<sup>2</sup>

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<sup>1</sup> Paragraph 12 of the complaint alleged: "The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 are erroneous and void as a matter of law for the reason that they are arbitrary and capricious and without foundation in substantial evidence in the record considered as a whole."

<sup>2</sup> Encompassed in the second point is the contention that the Commission erred in treating as irrelevant the injury to supporting shippers caused by the higher cost of common carrier service; erred in concluding that the supporting shippers would not be adversely affected by withholding from them a contract-carrier service meeting transportation needs which the existing common carriers do not adequately meet.

The Interstate Commerce Commission, in its answer, denied that its action in denying plaintiff the permit he requested was unlawful, and stated that the action it had taken was fully supported and justified by the record.

The trial examiner of the Commission found that the service proposed by plaintiff would be consistent with the public interest and the national transportation policy, and recommended that the authority requested be granted. Division 1 of the Commission, however, denied the authorization requested, although the trial examiner's findings of fact were adopted by the Commission as their own. The action of Division 1 was sustained by the full Commission, which held:

(a) that the findings of Division 1 are in accordance with evidence and the applicable law, and (b) that no sufficient cause appears, for re-opening the proceeding for reconsideration or for oral argument.

This action was brought by plaintiff for judicial review of this denial by the Commission.

There is no material dispute as to the facts. They are as follows:

Plaintiff requests permanent authority to operate as a contract carrier for Steele Canning Company and Cain Canning Company of Springdale, Arkansas, and for Keystone Packing Company of Fort Smith, Arkansas. He proposes to handle pool-truck shipments of less-than-truckload orders intended for delivery in 33 states, and to handle certain canning supplies on his return trips from 30 of these states. Steele Canning Company is the major shipper of the three that plaintiff proposes to serve. Steele normally purchases about 75% of the production of Cain and Keystone, which Steele in turn resells to the wholesale and retail market. Steele began transporting its own small

order loads in 1948. This operation increased as Steele's small order business increased, until the fleet of trucks operated by Steele numbered 29 in January of 1958. Throughout this period Steele handled most of its truckload shipments by common carrier, principally Jones Truck Line, Inc., of Springdale, Arkansas, who supports the plaintiff's application to handle the less-than-truckload orders.

Steele's less-than-truckload orders account for approximately 80% of its business, which it transported almost exclusively by its own private carriage until June of 1958, when a labor dispute interfered with such operations. Steele at that time prompted plaintiff to apply for authority to handle this operation as a contract carrier. In June 1958 the Commission granted plaintiff temporary operating authority substantially as requested by him. The service rendered by plaintiff under such authority was found by the trial examiner to be substantially similar to the private carrier operations previously performed by Steele. The contract service rendered by plaintiff to Cain and to Keystone largely involves their sales to Steele, but both are interested in developing their own less-than-truckload business, which plaintiff would handle.

The three canners insist that the only satisfactory alternative to private carriage is contract carriage of the type plaintiff proposes to offer and which he has performed for them under temporary operating authority. Their business is intensely competitive and has a small margin of profit. Most small order accounts operate on small inventories, making it critical that their orders be filled promptly. Further, Steele has found that many of its customers have special unloading times and requirements which must be observed at risk of the loss of that business. Because of these facts and because of the scattered location of the small

order customers throughout the 33 states named in plaintiff's application, these three canners insist that they would not be in a competitive position if forced to rely upon common carriers for delivery of less-than-truckload orders. Delays in "interlining" shipments, coupled with what the canners regard as "prohibitive" common carrier less-than-truckload rates, would, they say, place them at a disadvantage as to their competitors, who maintain their own fleets of trucks. The canners intend to abandon their private carriage operations and, in effect, use plaintiff as though he were their shipping department.

While the trial examiner found that some less-than-truckload shipments which require delivery stops for a portion of the freight at one or two points enroute to final destination had been satisfactorily handled by common carrier, the traffic that the three canning companies propose giving plaintiff involves from three to ten stops, with six stops being approximately the average less-than-truckload pooled shipment. This business has not in the past been handled by the protestant common carriers and, say the three shippers, will continue to be handled by private carriage if plaintiff's application is not granted, though the protestant common carriers insist that their experience indicates that they will receive some of this traffic if it is not handled by a contract carrier.

## I

The limits of permissible judicial review of the order of the Interstate Commerce Commission here in question are determined by Section 10(e) of the Administrative Procedure Act. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958). The appeal is upon the record made before the Commission and its order must be sustained if it is supported by substantial evidence



when viewed on the record as a whole and if the action taken is within the scope of its lawful authority. *Universal Camera Corporation v. Labor Board*, 340 U.S. 474, 490 (1951). Plaintiff alleges that the order under review lacks substantive support for several findings and conclusions expressed by Division 1 in its report, and further alleges that the report applies a test not permitted by statute.

Our review of the record has convinced us that the plaintiff is correct in these contentions.

## II

In declaring the national transportation policy, Congress included the following goals:

\* \* \* to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices \* \* \*. 54 Stat. 899 (1940), 49 U.S.C., preceding § 1 (1958).

We need not decide whether contract motor carriers are a separate "mode" of transportation from common motor carriers to hold, as we do, that the goal of the national transportation policy encompasses all modes and all carriers subject to regulation.

A contract carrier by motor vehicle is defined by statute as:

\* \* \* any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation \* \* \* [other than common carriers], under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continu-

ing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer. 71 Stat. 411 (1957), as amended, 49 U.S.C. § 303 (a) (15) (1958).

The Commission found that plaintiff would fit this definition, but upon its review of the entire case concluded:

It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J-T Transport, supra*.

\* \* \*

There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied.

The applicable section of the Interstate Commerce Act provides:

Subject to \* \* \* [the provision against holding both a common carrier certificate and a contract carrier permit], a permit shall be issued to any qualified applicant therefor au-

thorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers, [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements. 71 Stat. 411 (1957), 49 U.S.C. § 309(b) (1958).

There is no contention that plaintiff has not demonstrated his fitness and ability to meet the first two requirements for the issuance of a permit, and as is said in the Commission's opinion, the fifth matter for consideration is not involved. As shown above, the Commission found that the granting of the permit would have an adverse effect upon the protesting common carriers because such carriers could efficiently handle the business, and there was no adequate showing that the supporting shippers had a real need for the proposed service. Thus, the third and fourth criteria enumerated in the act are the only ones involved, and it is upon these conclusions that the Commission denied plaintiff a permit as not being

consistent with the public interest and the national transportation policy.

The statutory enumeration of factors for Commission consideration in determining consistency with the public interest and national transportation policy specifically includes the effect that a denial of the permit would have upon the supporting shippers, but as interpreted by the Commission—

\* \* \* whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements.

We find no authority for limiting the inquiry as to the effect of a denial of a permit to a mere inquiry as to the adequacy of presently available service. Indeed, as applied by the Commission in this case, there is no distinction between this test and the test of proving public convenience and necessity that must be met by applicants for a common carrier certificate.

Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application; the record, the findings of the examiner, and the specific findings of fact stated by Division 1 in its report all indicate the contrary—the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized. It does not do to say that the record is devoid of any substantial showing of dissatisfaction by the shippers with existing service because the complaints are not substantiated by reference to specific instances, or to hold that the shippers failed to show that

they had been unable to obtain reasonably adequate service upon request because existing common carriers, other than Jones, had been almost completely untried in recent years. The record clearly reveals that the shippers, particularly Steele Canning Company, are reasonably familiar with the services, including less-than-truckload rates, of the protestant shippers, and have not used them for the traffic in question because these services are inadequate.

Further, the "adequacy of existing service" test as applied by the Commission in this case in its determination of the effect upon supporting shippers of a denial of the permit is a test proscribed by the legislative history of the Interstate Commerce Act. In 1957 the Commission proposed to Congress several changes in the Act to enable it to better regulate contract carriers. As proposed, § 203(a)(15) of the Act [49 U.S.C. § 303(a)(15)] would have defined the term contract carrier by motor vehicle as meaning:

\* \* \* any person which engaged in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation \* \* \* under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.

Section 209(b) [49 U.S.C. § 309(b)] would have been changed to insert the requirement "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown". The amendment of the Interstate Commerce Act does not contain such language, however, and as amended by Public Law 85-163, 71 Stat. 411, the two sections read as previously quoted in this opinion.

Our study of the legislative history of this Act convinces us that the deletion of the willingness and

ability test was at the specific protest of the contract carriers, some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law 85-163, 71 Stat. 411). See, *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959).

We do not believe that there is any difference between the "willingness and ability" test deleted by Congress from the bill proposed by the Commission and the "adequacy of service" test which the Commission said it applied in this case—a separate test, it maintains, from the one deleted. We believe that the Commission's own opinion in this case shows that it did apply the "willingness and ability" test:

Applicant argues in his reply [referring to the 1957 amendments] that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11185 (Sub-No. 100) *J-T Transport, Inc., Extension—Columbus, Ohio*, M.C.C., decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common carrier service is a relevant matter which must be considered in disposing of contract carrier applications.



The decision of the Commission in the *J-T Transport, Inc.* case was attacked in a proceeding instituted by that applicant in the district court for the Western District of Missouri, Western Division, in the case of *J-T Transport Co., Inc., v. United States of America and Interstate Commerce Commission*. The three-judge court in that case handed down its opinion August 9, 1960, 185 Fed. Supp. 838, setting aside the order of the Commission for wrongfully applying the new criteria prescribed by the 1957 amendment to the Interstate Commerce Act. This case was one of first impression in construing the new status of an applicant for a permit as contract carrier when opposed by common carriers on the ground that adequate service was already available by common carrier. In that case, the court discussed exhaustively the legislative history of the 1957 amendments and concludes at page 848 of Fed. Supp.:

The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing service is adequate, the effect on existing protesting common carrier services is adverse. \* \* \* The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.

In this case, the only evidence of the adequacy of existing service to meet the transportation requirements of the supporting shippers came from the testimony of common carriers that they were willing and able to serve, though they had not been called upon by the shippers to do so in recent years as to the traffic in question; all the other testimony was to the effect that the existing service was considered inadequate by the shippers.

We do not believe that it was the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide. Sufficient tests and safeguards to control the granting of contract carrier permits are contained in the law to protect common carriers without the imposition by the Commission of a test which Congress deemed improper.

As the Court said in overruling the Commission in the *J-T Transport* case:

Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial of the permit. The statute does not say, "The permit shall be issued, unless an existing carrier will be adversely affected." It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209 (b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application.

### III

Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. Congress has declared one of the goals of our national

transportation policy is to promote "economical" service.

We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded.

#### IV

In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied.

Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not

be supplied by a common carrier. As the Court said in the *J-T Transport* case:

\* \* \* a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the distinct need of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's "*reasonable transportation needs*," that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

V

The orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 shall be set aside and their enforcement enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings in conformity with this opinion as may be proper.

**APPENDIX B**

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION**

**Civil Action No. 1531**

**ELVIN L. REDDISH, PLAINTIFF**

**v.**

**UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, DEFENDANTS**

**CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCK-  
ING ASSOCIATION, INC., INTERVENING PLAINTIFF**

**L. A. TUCKER TRUCK LINES, INC., ORSCHELN BROS.  
TRUCK LINES, INC., ARKANSAS-BEST FREIGHT SYS-  
TEM, INC., EAST TEXAS MOTOR FREIGHT LINES, INC.,  
GILLETTE MOTOR TRANSPORT, INC., WESTERN TRUCK  
LINES, LTD., REGULAR COMMON CARRIER CONFERENCE  
OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,  
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,  
AND 31 OTHER CLASS I RAIL CARRIERS IN WESTERN  
TRUNK LINE TERRITORY, INTERVENING DEFENDANTS**

**BEFORE MATTHEW, Circuit Judge, and MILLER and  
YOUNG, District Judges.**

**This opinion prepared by Judge Young and this  
day filed is hereby approved and adopted as the opin-  
ion of the Court and pursuant thereto**

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED that  
the orders of the Interstate Commerce Commission in-  
volved here be and are set aside as being unlawful**

and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.

This October 19, 1960.

[s] M. C. MATTHES,  
*Circuit Judge.*

[s] JNO. E. MILLER,  
*District Judge.*

[s] GORDON E. YOUNG,  
*District Judge.*



## **APPENDIX C**

### **INTERSTATE COMMERCE COMMISSION**

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**No. MC-117391**

#### **E. L. REDDISH CONTRACT CARRIER APPLICATION**

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*Decided June 30, 1959*

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Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities, (1) from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in 33 States, and (2) from points in 30 States to Springdale, Lowell, Fort Smith, and Westville, found not shown to be consistent with the public interest and the national transportation policy. Application denied.

*John H. Joyce and A. Alvis Layne, for applicant.*

*John C. Ashton, Edward G. Bazelon, Carl V. Kretzinger, J. Max Harding, Hugh T. Matthews, E. L. Ryan, Jr., J. W. Durden, Roy L. Eyster, Jerry Prestridge, Marion F. Jones, Gerald A. Orscheln, Vernon M. Masters, Thomas D. Boone, G. F. Gunn, Jr., and Chester G. Hayes, Jr., for protestants.*

#### **REPORT OF THE COMMISSION**

**DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND WEBB**

##### **By DIVISION 1:**

Joint and separate exceptions were filed by certain protestants to the order recommended by the examiner, and applicant replied. Our conclusions differ from those recommended.

By application filed May 13, 1958, as amended, E. L. Reddish, of Springdale, Ark., seeks a permit author-

izing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) of canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield, and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis), Texas (not including Dallas and Fort Worth), Virginia, West Virginia, and Wisconsin, and (2) of canned goods and materials and supplies used in the manufacture of canned goods, from points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago for articles other than metal cans and lids), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield, and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis for articles other than boxes), and Texas (not including Dallas and Fort Worth), to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla. The proposed service would be limited to a transportation service to be performed under a continuing contract or contracts with Steele Canning Company, of Springdale, Keystone Packing Company, of Fort Smith, and Cain Canning Com-

pany, Inc., of Springdale, hereinafter called Steele, Keystone, and Cain, respectively.

The Southwest Railroad Association, class I rail carriers in western trunkline territory, and numerous motor carriers<sup>1</sup> oppose the application.

The examiner recommended that the application be granted. On exceptions protestants assert that the examiner erred in concluding that a grant of the proposed authority would have no material adverse effect upon existing carriers and would be consistent with the public interest and the national transportation policy. Specifically, it is argued that, apart from evidence pertaining to rates, there is absolutely no evidence that protestants cannot satisfactorily perform the proposed service and that shippers' admitted dissatisfaction with protestants motor carriers' existing rate structure on less-than-truckload shipments does not constitute a statutory basis for the issuance of a permit. In reply applicant says that the conclusions and findings of the examiner are amply supported by the record. He urges that a grant will have no adverse effect on protestants, whereas a denial will disastrously affect shippers; that pro-

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<sup>1</sup> Frisco Transportation Company; Watson Brothers Transportation Company; Central Wisconsin Motor Transportation Company; The Chief Freight Lines Company; Campbell Sixty-Six Express, Inc.; Churchill Truck Lines, Inc.; Howard and James Nelson, doing business as Nelson Bros.; East Texas Motor Freight Lines, Inc.; Herrin Transportation Company; Western Trunk Lines, Limited; Gillette Motor Transport; Arkansas-East Freight System, Inc.; Be-Mac Transportation Company; Red Cargo Freight Lines, Inc.; Merchants' Fast Motor Lines, Inc.; Wright Motor Lines; Loring Truck Lines; Buckingham Transportation, Inc.; Buckingham Express; Buckingham Transfer; Orscheln Bros. Truck Lines, Inc.; Southwest Freight Lines, Inc.; Freightways, Inc.; Missouri Arkansas Transport Company; and L. A. Tucker Truck Lines.

testants' service is irregularly conducted and prohibitively priced; that protestants cannot provide the necessary multiple pickups and multiple deliveries; and that a denial of the application will force shippers to expand private-carriage operations. Applicant contends that the 1957 amendments to the contract-carrier provisions of the Interstate Commerce Act, coupled with the Supreme Court's decision in *Schaffer Transp. Co. v. United States*, 355 U.S. 83, in effect set contract carriage apart from common carriage as a "separate mode of transportation," and that in determining an application for contract-carrier authority we must consider whatever distinct advantages contract-carrier service may have over common-carrier service, including the possible ability of a contract carrier to offer service at a lower rate. He further argues that in determining contract-carrier applications this Commission is limited in the issues which may be considered to those specifically set out in section 209(b) of the act; and that, in light of these criteria, he has demonstrated that a grant of authority would be consistent with the public interest and the national transportation policy.

The evidence adduced, the examiner's recommendation, the exceptions, and the reply have been considered. The examiner's statement of facts is correct in all material respects, and we adopt it as our own. The facts are repeated only insofar as is necessary for discussion of the issues.

Applicant holds no permanent motor-carrier authority. On June 12, 1958, he had nine tractor-trailer units under long-term lease to Steele. Because of a strike of Steele's drivers, applicant obtained temporary authority to transport, under contract with Steele, certain of the involved commodities from and to numerous points which he here proposes to serve. The temporary authority is conditioned to

expire upon final determination of this proceeding. Practically all of the outbound shipments were comprised of less-than-truckload shipments for delivery at several points en route, including points in different States. For these small shipments, applicant assessed a rate computed on the basis of his truckload rate, with no extra charge for stopping in transit.

Steele operates a plant at Lowell and a warehouse at Springdale. In addition to manufacturing and shipping between 500,000 and 600,000 cases of canned fruits and vegetables annually, Steele, prior to the strike purchased and distributed approximately 85 percent of Cain's production, or between 500,000 and 600,000 cases annually, and 75 percent of Keystone's production, or between 400,000 and 500,000 cases. The strike has caused Steele to curtail these purchases by about 10 percent. In addition, Steele makes substantial purchases from canners at Westville and Springdale. Steele takes title to the commodities at the plants of the suppliers and selects the carrier for the initial movement to the customers and to its warehouse in Springdale. Steele ships a substantial volume of canned goods in straight truckload lots to the points in the States here involved; however, the majority of its outbound shipments, and this portion of its outbound traffic is increasing, are combined loads comprised of small volume orders of several customers requiring expeditious service. Often these loads are composed of shipments picked up at more than one of the plants of its suppliers. A movement normally requires up to six or more stops en route for delivery to consignees in two or more States. The shipper has customers at various points in the destination States and is continually expanding its sales area. Its customers maintain a low inventory, thus requiring shipper to make deliveries on short notice. In addition to controlling

outbound movements, Steele obtains title to all inbound materials and supplies at the source of supply and selects the carrier for the inbound movements. It purchases necessary items used in the manufacture of canned goods at many points in the territory here involved.

Since 1948 Steele has conducted private motor-carrier operations, and about 80 percent of its traffic has moved in this way or, since its labor difficulties began, by applicant under temporary authority. Most of its remaining traffic has been transported by motor common carriers, with most of the shipments being originated by Jones Truck Line, Inc., which does not oppose the application. Rail service has also been used to a limited extent. The motor common carriers provide service to authorized destination points and select the connecting carriers for joint-line movements to points beyond their authorized territory. Although it desires a single-line service to all points, Steele will continue to use the joint-line service of existing common carriers on truckload movements. It asserts that on less-than-truckload shipments existing carriers are unable to provide multiple pickup and multiple delivery service, and that their service is not expeditious. However, its support of the application is primarily predicated on its opinion that existing rates on less-than-truckload shipments are prohibitive. Because of the competitive situation, and the small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that it would be forced out of business if it had to ship the numerous small orders of canned goods, in less-than-truckload quantities, at less-than-truckload, common-carrier rates, and that successful operations of its business necessitates the movement of this traffic in consolidated loads, either by private carriage or by for-hire motor carriers at truckload rates. Steele de-



sires to terminate its private operations because of labor difficulties and to utilize applicant instead. It will enter into appropriate contracts if authority is granted. If the application is denied, the shippers will continue to use private carriage without resorting to further common-carrier service because such carriers' less-than-truckload rates are considered prohibitive.

Cain is willing to provide the volume of canned goods which will be required by Steele in the future; however, it is desirous of selling and shipping a substantial portion of its production to prospective customers at various points in the States here involved so as not to be dependent on one or more large customers for the sale of its products. Prior to the strike, it never sold directly to customers, the supplies not used by Steele having been sold to other canning companies in Arkansas and Oklahoma. These companies picked up the freight at Cain's plant. Since the strike, it has had several direct sales to customers at Kansas City, St. Louis, and Chicago, which were satisfactorily handled by Jones Truck Line, Inc. All inbound supplies are either furnished by Steele or by brokers who control the traffic. Cain fears that it will not be able to expand its sales area if it is forced to ship at less-than-truckload rates and that existing motor carriers will be unable to handle small shipments in combined loads. Admittedly, this shipper is not very familiar with the service provided by the existing motor carriers and supports applicant on inbound shipments so as to insure him a balanced operation and enable him to render a better service on outbound movements.

Keystone has an operation similar to that of Cain. However, that portion of its production which is not purchased by Steele is sold by the shipper and delivered by rail and motor carriers to customers at sev-

eral points in the territory here involved. Existing service on truckload traffic is satisfactory, but the shipper is convinced that it would be unable to ship less-than-truckload traffic because of transportation costs. However, if the proposed service were authorized it would make an effort to obtain sales and ship the freight in loads requiring delivery at two or more points en route and at truckload rates for each shipment. The shipper has begun to operate two trucks in private carriage and will supplement its fleet if the application is denied and its small orders increase.

A number of motor-carrier protestants presented evidence of their authorities and operations. These are discussed in detail in the examiner's report and need not be repeated here. By either direct- or joint-line service motor protestants can provide service to substantially all the points involved herein. Each of the opposing motor carriers, except Nelson Brothers, is a common carrier, and each operates a substantial amount of equipment suitable for the transportation of the commodities here involved. Although shippers have knowledge of the availability of service from several protestants, none of the protestants have participated in the involved traffic. All have expressed an interest in participating in this traffic either as initial or connecting carriers on both inbound and outbound shipments. They have handled both large and small shipments of the type of traffic here involved and are willing to provide multiple pickup and delivery where authorized. They believe that until their service is tried and found wanting there is no justification for a grant of additional authority.

The Western Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, the Great Northern Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company, in con-

nection with other rail carriers, operate extensively throughout the territory. Canned goods constitute a substantial part of their traffic, and they have been experiencing a sharp decline in canned goods tonnage. To a limited extent they have participated in outbound movements of the supporting shippers' traffic, and to a greater extent they have handled inbound shipments of materials and supplies. They contend that they are able to provide needed service and that the shippers have failed to take full advantage of their facilities. They are particularly anxious to retain inbound traffic moving from many points in the territory applicant wishes to serve to the shippers' plants.

Applicant argues in his reply to exceptions that the 1957 amendments to certain sections of the act affecting contract carriage and the decision in *Schaffer Transp. Co. v. United States, supra*, set contract carriage apart from common carriage as a separate mode of transportation, and that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, hereinafter referred to as the *J-T Transport* case; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common-carrier service is a relevant matter which must be considered in disposing of contract-carrier applications.

Section 209(b) of the act sets forth certain criteria which must be considered, among other things, in determining whether the issuance of a permit will be consistent with the public interest and the national

transportation policy. These are: (1) the number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon protesting carriers, (4) the effect of a denial on applicant and his supporting shipper, and (5) the changing character of the shipper's requirements. It should be noted, however, that these are not factors that must be considered exclusively. Other matters affecting the public interest and the national transportation policy, must also be examined. See *J-T Transport case, supra*.

The first of the statutory enumerated factors is to be considered in relation to the question whether applicant intends to serve "one or a limited number of shippers," and is thus a bona fide contract carrier as defined in section 203(a)(15) of the act. We think that applicant, who proposes to limit his service to only three shippers, meets this particular requirement.

The next factor, the nature of the proposed service, requires a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stopoff in transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commo-

tica. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted.

Section 209(b) next requires us to determine the effect upon protesting carriers which a grant of authority to a contract carrier would have. It is clear that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J-T Transport case, supra*.

Section 209(b) also requires us to consider the effect of a denial on applicant and its supporting shipper. Applicant is a new entrant into the field of motor transportation, and we think it clear that a denial of this application could not be said to affect him adversely. Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they "have been unable to obtain reasonably adequate service upon request. In fact, the



existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application.

The final matter which section 209(b) directs us to consider in determining a contract-carrier application is the effect which a denial would have upon the changing character of the shipper's requirements. This factor should be applied in two different situations. First, where a contract carrier is presently serving a shipper and the shipper's requirements change because, for example, it develops a new type of product or opens new markets, its need for a complete transportation service should be considered in determining whether an application should be granted. This situation is not present here, since this is applicant's first attempt to obtain permanent operating authority. Second, we must consider whether there is likelihood that the shipper's transportation requirements will change at some future date in such a manner as to make the service proposed by a contract-carrier applicant necessary. In the instant case there is no indication that the nature of the shipper's needs is likely to change so as to render existing common-carrier service unsatisfactory.

There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract-carrier service. On the contrary,



the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common-carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied.

We find that applicant has failed to establish that the proposed operation will be consistent with the public interest and the national transportation policy; and that the application should be denied. An order denying the application will be entered.

COMMISSIONER WEBB concurs in the result.

## APPENDIX D

### STATUTES INVOLVED

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., S. 1384, provides as follows (deletions by the amendment shown in black brackets, additions made by the amendment in italics):

The term "contract carrier by motor vehicle" means any person which, ~~under individual contracts or agreements~~, engages in ~~the~~ *transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation* (other than transportation referred to in paragraph (14) and the exception therein), ~~by motor vehicle of passengers or property in interstate or foreign commerce for compensation~~ *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*

Section 209(b) of that Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-12, Public Law 85-163, 85th Cong., S. 1384, provides as follows (deletions and additions made by the amendment are shown in same manner as shown for Section 203(a)(15)):

*Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain*

such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, *including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as [are] may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the [operational]*

operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided, [however,] That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute [or add] similar contracts within the scope of [the] such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a) (15), as in force on and after the effective date of this proviso. [or to add to his or her equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.]*

Office Supreme Court, U.S.

FILED

FEB 14 1961

JAMES A. BROWNING, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

ARKANSAS-BEST FREIGHT SYSTEM, INC.  
EAST TEXAS MOTOR FREIGHT LINES, INC.  
GILLETTE MOTOR TRANSPORT, INC.  
WESTERN TRUCK LINES, LTD.

AND

REGULAR COMMON CARRIER CONFERENCE  
OF AMERICAN TRUCKING ASSOCIATIONS, INC.

*Appellants*

v.

ELVIN L. REDDISH, ET AL.

*Appellees*

**On Appeal from the United States District Court for the  
Western District of Arkansas—Ft. Smith Division**

**JURISDICTIONAL STATEMENT**

ROLAND RICE

618 Perpetual Bldg.

1111 E Street, N.W.

Washington 4, D. C.

ROLLO E. KIDWELL

HUGH T. MATTHEWS

2130 Fidelity Union Tower

Dallas 1, Texas

J. W. DURDEN

THOMAS HARPER

Kelly Building

P. O. Box 298

Ft. Smith, Arkansas

*Attorneys for Appellants*

February 14, 1961

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

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No. \_\_\_\_\_

ARKANSAS-BEST FREIGHT SYSTEM, INC.  
EAST TEXAS MOTOR FREIGHT LINES, INC.  
GILLETTE MOTOR TRANSPORT, INC.  
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REGULAR COMMON CARRIER CONFERENCE  
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v.

ELVIN L. REDDISH, ET AL.

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On Appeal from the United States District Court for the  
Western District of Arkansas—Ft. Smith Division

\_\_\_\_\_  
**JURISDICTIONAL STATEMENT**  
\_\_\_\_\_

**OPINIONS BELOW**

The opinion of the United States District Court for the Western District of Arkansas is reported at 188 F. Supp. 160. The decision of Division 1 of the Interstate Commerce Commission appears at 81 M.C.C. 35. Because both the foregoing are relatively long and since they are set forth as Appendix A and Appendix C, respectively, to the Jurisdictional Statement being concurrently filed with this Court by the Interstate Commerce Commission

following its notice of appeal of the decision below, we respectfully ask leave to treat these decisions thus filed as if incorporated herein. Petition for reconsideration of the Division 1 report and order having been denied by order of the entire Commission dated December 16, 1959, the Division 1 report and order stands as the final decision of the Commission. The denial order of the entire Commission is attached hereto as Appendix A.

### **JURISDICTION**

This suit was brought under 28 USC §§ 1336, 1398, 2284 and 2321 through 2325 inclusive, to set aside the order of the Interstate Commerce Commission. The judgment of the district court attached as Appendix B, was entered on October 19, 1960, and notice of appeal was filed in that court by Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and Regular Common Carrier Conference of the American Trucking Associations, Inc., on December 16, 1960.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal in this case:

*Frozen Food Express, Inc. v. U.S.*, 351 U.S. 40; *American Trucking Associations, Inc., et al. v. Frisco Transportation*, 358 U.S. 133; and *American Trucking Associations, Inc., et al., v. U.S., et al.*, 364 U.S. 1.

### **STATUTES INVOLVED**

The National Transportation Policy, 49 U.S.C., preceding Section 1, and Sections 203(a)(15) and 209(b) of the

Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309 (b) are set forth verbatim in Appendix C.

### QUESTIONS PRESENTED

1. Whether under the 1957 Amendments to Section 209(b) of the Interstate Commerce Act the district court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.

2. Whether the district court erred in holding that the Commission, in determining whether issuance of a permit under Section 209(b) is consistent with the public interest and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, even assuming the evidence of record before the Commission will support a finding that the lower rates result from economies and advantages inherent in the contract carrier's operation.

3. Whether the district court when substituting its judgment for that of the Interstate Commerce Commission in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

### STATEMENT

Although this proceeding is closely related to *J-T Transport Co., Inc. v. United States of America and Interstate Commerce Commission*, 185 F. Supp. 838 (Notice of Appeal in which was filed October 7, 1960)<sup>1</sup> distinct and crucial questions have been injected here which are not before this Court in the *J-T* case.

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<sup>1</sup> Because of the inter-relation of legal issues in this case and in *J-T*, we respectfully suggest that the Court may wish to consolidate these cases for joint disposition.

On May 13, 1958, Elvin L. Reddish filed his application to institute permanent motor contract carrier service transporting canned goods from Springdale, Lowell and Ft. Smith, Arkansas, and Westville, Oklahoma, to virtually all points in thirty-three states and transporting canned goods and materials and supplies used in the manufacture of canned goods between substantially the same points in the reverse direction. The application was actively opposed by a large number of motor common carriers, including these motor common carrier appellants, as well as by many railroads. Jones Truck Line, Inc., contrary to the opinion of the court below at 188 F. Supp. 162, took no part in the proceeding.

The service to be performed by Reddish would be for and under continuing contracts with Steele Canning Company of Springdale, Arkansas; Keystone Packing Company, Ft. Smith, Arkansas; and Cain Canning Company, Inc., Springdale, Arkansas. Reddish holds no certificate or permit issued by the Interstate Commerce Commission other than a temporary authority permit to serve the Steele Canning Company, rendering a portion of the service for which permanent authority is sought in this proceeding.

Contrary to the opinion of the court below at 188 F. Supp. 162, the Reddish application is not limited to the transportation of less-than-truckload shipments, although Mr. Reddish under temporary authority published a rate schedule or a tariff which offered less-than-truckload service (R. 67-72)<sup>2</sup> at rates approximately equal to motor common carrier truckload rates (R. 457) and substantially below appellant carriers' less-than-truckload rates. (R. 227) The dissatisfaction of supporting shippers with existing common carrier service is directed almost wholly at the rates assessed by these protesting motor common carriers

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<sup>2</sup> "R" indicates pages in the hearing transcript of testimony.

on less-than-truckload shipments of canned goods. No other substantial claim of inadequacy in existing service was voiced by supporting shippers, although there was shipper testimony, unsupported by documentary evidence, that use of motor common carrier service resulted in delayed shipments. The Hearing Examiner found<sup>3</sup> as a fact that:

"It (Steele) is obtaining satisfactory service from the existing motor common carriers on straight truckload shipments of canned goods from and to the points here involved, and the record indicates that some of these motor carriers have provided satisfactory service on some truckload shipments which required stop-offs for delivery of a portion of the freight at one or two points en route to final destination." (Appendix D, Page 31)

The Commission, Division 1, as was its duty, weighed the evidence of record, considered the Examiner's report, and upon the foregoing subject reached the following conclusion at 81 M.C.C. 42:

"There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates."

Steele, the principal supporting shipper, has used the services of Jones Truck Lines, Inc., Arkansas-Best Freight System, Inc., England Bros. Truck Line, Campbell's "66" Express, M & A Transportation Company and Frisco Transportation Company (R. 139) (and probably that of connecting carriers with whom it is not familiar), all of

<sup>3</sup> Examiner's report attached as Appendix D.



which are motor common carriers. Steele intends to continue the use of motor common carriers (R. 141, 237).

Reddish proposed no specialized or distinct service which would be materially different from that offered by existing motor common carriers, and the record before the Commission fails to disclose any need for a specialized service. Both Reddish and protestant motor common carriers operate tractors with van semitrailers. Each offers a less-than-truckload service, i.e., each will transport a relatively small shipment from one consignor to one consignee. If this authority is granted as sought, each would be authorized—as are already the protestants—to render truckload service, i.e., one relatively large shipment of a specified minimum volume, from one consignor to one consignee. Each would be authorized to render a truckload service with stopping-in-transit for partial unloading privileges, i.e., a large shipment from one consignor to a very limited number of different consignees at different locations, with a truckload rate being assessed plus an additional stopping-in-transit charge. Thus the service of the contract carrier, Reddish, would be practically identical to that of the common carriers.

In the actual use of his tariff filed for the temporary operation Reddish, in practice, offered several stops in transit at the truckload rate and assessed no stopping-in-transit charge, thus rendering a service tantamount to less-than-truckload service at truckload rates.

Reddish does not propose to dedicate equipment to the exclusive use of any particular shipper (R. 102-103). In fact, there was no showing of any specialized type of service to distinguish applicant from existing motor common carriers; only his lower level of rates, which result in a cut-rate service to the supporting shippers, distinguishes him from motor common carrier appellants.

There is not a scintilla of evidence in the record before the Commission which would even remotely establish that

the cut-rate service is made feasible through a more economical operation by Reddish. The record is totally silent on the operating costs of any carrier party to the proceeding.

The Hearing Examiner in his recommended report proposed that the application be granted. Numerous protestants filed exceptions to which Reddish replied. Division 1 concluded that the application should be denied in its entirety, this decision appearing, as noted, at 81 M.C.C. 35. The entire Commission unanimously accepted the Division 1 report and denied applicant's petition for reconsideration by order dated December 16, 1959. The Contract Carrier Conference of American Trucking Associations, Inc., by the same order was granted intervention in support of Reddish, and the Regular Common Carrier Conference of American Trucking Associations, Inc., was granted intervention in support of the protesting common carriers.

Reddish, supported by the Contract Carrier Conference, filed its complaint in the United States District Court for the Western District of Arkansas, Fayetteville Division, on January 27, 1960, attacking the Commission's final order. These appellants were allowed to intervene in support of the defendant. The matter was subsequently transferred to the Ft. Smith Division which rendered its decision on October 19, 1960. This decision, reported at 188 F. Supp. 160, sets aside the report and order of the Commission and remands the cause to the Commission for further proceedings. Subsequently, the Interstate Commerce Commission and these appellants filed their respective notices of appeal to this Court.

### **THE QUESTIONS ARE SUBSTANTIAL**

This proceeding, like that in *J-T Transport, Inc. v. United States of America and Interstate Commerce Commission*, supra, is a case of first impression interpreting

amendments enacted in 1957 to the Interstate Commerce Act. Both require interpretation of the requisite standards of proof necessary to acquire a contract carrier permit under that Act. This proceeding, however, involves specific pronouncements of law in addition to those decided in the *J-T* case, and which are diametrically opposed to long standing Commission policy.

The decision of the court below reverses a cardinal principle adhered to by the Commission since 1937, known to Congress in 1957, but a principle in no way modified by Congress in the amendments of that year. The impact of the lower court's decision will be felt by every regulated for-hire interstate motor carrier within the Commission's jurisdiction because it holds that the Commission must give favorable consideration to a contract carrier applicant's willingness to provide transportation at lower rates even though the services of existing common carriers are entirely adequate and are offered at rates within the rate requirements of the Interstate Commerce Act. In the field of rates, the decision of the court below can lead only to destructive competition among the various motor carriers and a material weakening of the national transportation system, whose strength Congress has charged the Commission with the responsibility of fostering. This the court below has done without benefit of any judicial precedent or legislative mandate; indeed, even without support of facts of record.

1. The first question presented is whether under the 1957 amendments to Section 209(b) of the Interstate Commerce Act the district court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon existing carriers of a grant or denial of contract carrier rights. In this proceeding, as in the *J-T* case, *supra*, it is imperative that the Court review and reverse the holding of the court below on this point.

Whether the principle is termed an "adequacy of existing service" test, a "willingness and ability" test, or by some other name, the Commission still must be allowed to consider the service which the shipper would use in the event a contract carrier application is denied. Section 209(b) now provides that the Commission shall consider "the effect which denying the permit would have upon the applicant and/or its shipper."

How can the Commission determine the effect of a denial upon a shipper except by studying the service which the shipper would then be forced to use? In this proceeding denial would force the shippers to use private carriage or common carriage, there being no other alternate service. Would the use of common carrier service adversely affect the shipper? It would not if that service is "adequate" to meet the shippers' needs. This is the "adequacy of existing service" test and is clearly included in the 1957 amendments. The Commission has not here held that the "adequacy of service" test is the sole criterion to be considered, but has rightly held, as in the *J-T* case, *supra*, that this test is still a valid consideration. It is not exclusive, but it is valid.

The protection of "adequate" existing service from excessive competition is vital to the entire for-hire motor carrier industry, both common and contract. The 1957 amendments were made specifically to protect motor common carriers. On this point the Senate Committee charged with responsibility for the legislation said:

"Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

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\* S. Rep. No. 703, 85th Congress, 1st Session (1957) p. 7.

The decision of the court below is diametrically opposed to the stated purpose of the 1957 amendments because it opens the door to unlimited competition regardless of the adequacy, willingness, ability, even eagerness of common carriers to provide the required service to the shipper.

2. Under Section 216 of the Interstate Commerce Act, 49 U.S.C. Sec. 316, common carriers are required to publish and assess reasonable rates which are not unduly prejudicial or preferential to any shipper. Aggrieved shippers may file their complaint with the Interstate Commerce Commission which has the jurisdiction to require removal of unlawful rates. None of the supporting shippers herein have filed a complaint action against the existing rates of motor carrier appellants in this proceeding (R. 440, 459). Supporting shippers have chosen an improper remedy, as the Commission correctly held, saying:

"It may fairly be concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the Act." 81 M.C.C. 35, at 42-43.

The rule of law is not of recent origin. It was pronounced by the Commission at least as early as April, 1937, in *Wellspeak Common Carrier Application*, 1 M.C.C. 712. It has been applied to contract carrier applications. *Dixon & Koster Contract Carrier Application*, 32 M.C.C. 1.

The court below, without citation to any judicial precedent, holds that the 1957 enactments require the Commission to overturn this long established principle even though the question is not even mentioned in those amendments or in Senate Report No. 703 and obviously was

given no consideration by Congress in connection with the proposed revisions to Section 209 of the Act. The court ruled at 188 F. Supp. 167:

"Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered, perhaps, but evidence of efficient operation must be heeded."

There is no evidence of efficient operation on the part of Reddish in this record. There is no evidence of comparative costs of operation between Reddish and motor common carriers. Not only does the court below reverse a long standing administrative principle but also it substitutes its judgment for that of the Commission and renders a conclusion totally without support in the evidence of record. Moreover, appellants submit that the only source of the court's conclusion that Reddish can operate more economically than common carriers must be the brief filed before the court by the Department of Justice which at page 13 cites certain textbooks on motor transportation.

While the manner in which motor carriers *can* become cut-rate operators is well shown by the Commission's decision in *M. B. Johnson Common Carrier Application*, 18 M.C.C. 194, appellants, nevertheless, urge that there is no evidence of record sufficient here to allow the Commission or the court to ascertain just what the Reddish operation costs Reddish. The court below errs, we urge, when it holds that the low rates of Reddish result from "economies and advantages inherent in contract carrier operation."



Of more importance to the regulated for-hire motor carrier industry, however, is the holding of the court that the Commission must give consideration under the amended Section 209 to lower rates proffered by a contract carrier applicant. Consideration in a Section 209 proceeding of the level of rates applicable to existing service must inevitably result in a substantial broadening of issues with consequent delay in the issuance of a final order by the Commission. Worse yet, it will encourage destructive competition because the shipper's constant quest for lower transportation costs will be translated into duplicative, competitive service. If Steele Canning Company here is successful in securing the service of Reddish merely because Reddish offers lower-rated service, what is there to protect Reddish from future competition at the hands of a still more ruthless rate-cutter?

The Commission, in its wisdom, has for almost twenty-five years held that shippers dissatisfied with an existing scale of rates should attack that scale of rates directly rather than attempt to circumvent the scale by supporting the institution of new competitive for-hire service. It is imperative to the for-hire motor carrier industry that the right of the Commission to continue this rule—in the total absence of Congressional mandate to the contrary—be upheld, and it is significant that the Contract Carrier Conference in the court below gave Reddish no support on this point. The statutory provisions for adjudicating rates need not be thrown into the discard.

3. While it is true that a major area of contention between the parties lies in the third and fourth criteria of Section 209(b), there assuredly is contention also over the second criterion, "the nature of the service proposed." The court below held at 188 F. Supp. 164 that there was no contention between the parties on this point, notwithstanding the argument of these appellants at pages 26 through 31 of their brief to that court. Reddish has *not*

proposed, nor do the supporting shippers need, a distinctive or specialized service as was properly concluded by the Commission at 81 M.C.C. 41. Reference to this portion of the Division 1 report clearly rebuts the following statement of the court below:

"Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier." (188 F. Supp. 167)

Thus the court ignores a significant paragraph in the Division 1 report and substitutes its judgment for that of the Commission, implying by its quotation of the *J-T* decision that there *has* been proposed a *specialized* service designed to meet the *distinct* need of the supporting shippers.

The Commission, not the court, has been empowered by Section 209(b) to consider "the nature of the service proposed", and a reviewing court exceeds its proper function when it does other than ascertain whether the Commission has fairly considered "the nature of the service proposed." *Gray v. Powell*, 314 U.S. 402, 72 S. Ct. 326. Thus there is disagreement not only between the parties on this second criterion but also between the Commission and the court.

The irony of the conflict is apparent when the conclusion of the Senate Committee reporting on S. 1384—which became the amendment at issue—is recalled:

"The present law has proved inadequate to maintain proper distinctions between common and contract carriage. It has made difficult in this area of regulation, of obtaining the objectives of the national transportation policy. The decision of the Supreme Court in *United States v. Contract Steel Carriers* points out clearly a need for a change in the statute."<sup>a</sup>

<sup>a</sup> S. Rep. 703, 85th Congress, 1st Session (1957).

If the decision of the court below is allowed to stand, has the law been cleared of confusion or has the confusion merely been compounded? Shall the Commission determine whether there has been proposed a *specialized* service designed to meet the distinct needs of the supporting shipper or shall the reviewing court make this determination? Proper administration of the Act requires, we submit, that the Commission, exercising its expertise, make this critical and often difficult determination.

### CONCLUSION

The questions presented by this appeal are substantial and of such public importance as to require plenary consideration, with briefs and oral argument for their resolution.

Respectfully submitted,

ROLAND RICE

618 Perpetual Bldg.

1111 E Street, N.W.

Washington 4, D. C.

ROLLO E. KIDWELL

HUGH T. MATTHEWS

2130 Fidelity Union Tower

Dallas 1, Texas

J. W. DURDEN

THOMAS HARPER

Kelly Building

P. O. Box 298

Ft. Smith, Arkansas

*Attorneys for Appellants*

February 14, 1961

**CERTIFICATE OF SERVICE**

I, Roland Rice, one of the attorneys for Appellants Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and Regular Common Carrier Conference of the American Trucking Associations, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of February, 1961, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties as follows:

1. On the United States, by mailing copies, duly addressed and postage prepaid, to Hon. Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., W. Wallace Kirkpatrick, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C., Richard H. Stern, Attorney, Department of Justice, Washington 25, D. C., and Charles W. Atkinson, United States Attorney, Ft. Smith, Arkansas, air mail postage prepaid.

2. On the Interstate Commerce Commission, by mailing copies duly addressed and postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, and to Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, at their offices in Washington, D. C.

3. On Elvin L. Reddish, plaintiff herein, by mailing copies in duly addressed envelopes, air mail, postage prepaid, to John H. Joyce, 26 North College, Fayetteville, Arkansas, and by first class mail, postage prepaid, to A. Alvis Layne, Pennsylvania Building, Washington 4, D. C., its attorneys.

4. On the intervening plaintiffs herein, by mailing copies in duly addressed envelopes, to their respective attorneys of record, as follows:

With air mail postage prepaid, to Clarence D. Todd, Esq., 1825 Jefferson Place, N. W., Washington, D. C. and with air mail postage prepaid, to John H. Joyce, 26 North College, Fayetteville, Arkansas.

5. On other intervening defendants herein by mailing copies in duly addressed envelopes to their respective attorneys of record, as follows:

With air mail postage prepaid, to George F. Gunn Jr., Esq., Suite 1230 Boatmen's Bank Building, St. Louis 2, Missouri, E. L. Ryan, Jr., Esq., Chicago, Rock Island and Pacific Railroad Company, LaSalle St. Station, 139 West Van Buren St., Chicago 5, Illinois, and to Heartsill Ragon, Esq., and H. P. Warner, Esq., Suite 522, Merchants National Bank Building, Ft. Smith, Arkansas.

ROLAND RICE  
Of Counsel for  
Appellants named herein.

## APPENDIX A

## ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 16th day of December A. D. 1959

No. MC-117391

E. L. REDDISH CONTRACT CARRIER APPLICATION  
(Springdale, Ark.)

Upon consideration of the record in the above-entitled proceeding, and of:

- (1) Petition of Contract Carrier Conference of the American Trucking Associations, Inc., dated August 14, 1959, for leave to intervene.
- (2) Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc., dated September 17, 1959, for leave to intervene.
- (3) Petition of applicant filed August 14, 1959, for reconsideration and oral argument.
- (4) Petition tendered August 14, 1959, by the Contract Carrier Conference of the American Trucking Associations, Inc., for reconsideration.
- (5) Reply dated September 2, 1959, by Watson Bros. Transportation Co., Inc., protestant, to petitions in (3) and (4) above.
- (6) Joint reply dated September 4, 1959, by Wright Motor Lines, Inc., Loving Truck Lines, Buckingham Transportation, Inc., Buckingham Express, Inc., Buckingham Transfer, Inc., and Buckingham Transportation, Inc., as operator of Des Moines Transportation Company, Inc., protestants, to the petitions in (3) and (4) above.



- (7) Joint reply filed September 14, 1959, by Southwest Railroad Association, Class I Rail Carriers in Western Trunkline Territory, protestants, to petitions in (3) and (4) above.
- (8) Joint reply dated September 16, 1959, by Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines Inc., Herrin Transportation Company, Gillette Motor Transport, Inc., and Western Truck Lines, Ltd., protestants to petitions in (3) and (4) above.
- (9) Tendered reply dated September 17, 1959, by the Regular Common Carrier Conference of the American Trucking Associations, Inc., to petitions in (3) and (4) above.
- (10) Reply dated September 21, 1959, by L. A. Tucker Truck Lines, Inc., protestant, to petitions in (3) and (4) above.

*It is ordered*, That petitioners in (1) and (2) above be, and they are hereby permitted to intervene in said proceeding with the right to appear and participate in all further proceedings therein;

*It is further ordered*, That the tendered petition in (4) above and the tendered reply in (9) above be, and they are hereby, accepted for filing;

*It is further ordered*, That the petitions in (3) and (4) be, and they are hereby, denied for the reasons (a) that the findings of Division 1 are in accordance with the evidence and the applicable law, and (b) that no sufficient cause appears, for reopening the proceeding for reconsideration or for oral argument.

By the Commission.

HAROLD D. MCCOY,  
Secretary.

(SEAL)

**APPENDIX B**

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FORT SMITH DIVISION**

Civil Action No. 1531

**ELVIN L. REDDISH, PLAINTIFF**

**v.**

**UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS**

**CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING  
ASSOCIATIONS, INC., INTERVENING PLAINTIFF**

**L. A. TUCKER TRUCK LINES, INC.,  
ORSCHELN BROS. TRUCK LINES, INC.,  
ARKANSAS-BEST FREIGHT SYSTEM, INC.,  
EAST TEXAS MOTOR FREIGHT LINES, INC.,  
GILLETTE MOTOR TRANSPORT, INC.,  
WESTERN TRUCK LINES, LTD.,  
REGULAR COMMON CARRIER CONFERENCE OF  
THE AMERICAN TRUCKING ASSOCIATIONS, INC.,  
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,  
AND 31 OTHER CLASS I RAIL CARRIERS IN  
WESTERN TRUCK LINE TERRITORY  
INTERVENING DEFENDANTS**

**BEFORE MATTHES, Circuit Judge, and MILLER and YOUNG,  
District Judges.**

This opinion prepared by Judge Young and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the  
orders of the Interstate Commerce Commission involved**

here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.

This October 19, 1960.

/s/ M. C. MATTHES  
Circuit Judge

/s/ JNO. E. MILLER  
District Judge

/s/ GORDON E. YOUNG  
District Judge

## APPENDIX C

### *National Transportation Policy*

"[September 18, 1940.] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

### DEFINITIONS

#### *Section 203(a)(15) of the Interstate Commerce Act*

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of

motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

#### PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE

##### *Section 209(b) of the Interstate Commerce Act*

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at

the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions, or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso."



**APPENDIX D****INTERSTATE COMMERCE COMMISSION****Served Jan. 2, 1959****NOTICE TO THE PARTIES**

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-117391

## E. L. REDDISH CONTRACT CARRIER APPLICATION

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Decided

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Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities, (1) from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in 33 States, and (2) from points in 30 States to Springdale, Lowell, Fort Smith, and Westville, found consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

*John H. Joyce and A. Alvis Layne* for applicant.

*John C. Ashton, Edward G. Bazelon, Carl V. Kretzinger, J. Max Harding, Hugh T. Matthews, E. L. Ryan Jr., J. W. Durdan, Roy L. Eyster, Jerry Presbridge, Marion F. Jones, Gerald A. Orschein, Vernon M. Masters, Thomas D. Boone, G. F. Gunn, Jr. and Chester G. Hayes, Jr.,* for protestants.

## REPORT AND ORDER

## RECOMMENDED BY H. L. HANBACK, HEARING EXAMINER

By application filed May 13, 1958, as amended, E. L. Reddish, of Springdale, Ark., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) of canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minne-

sota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis), Texas (not including Dallas and Fort Worth), Virginia, West Virginia, and Wisconsin, and (2) of canned goods, and materials and supplies used in the manufacture of canned goods, from points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago for articles other than metal cans and lids), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis for articles other than boxes), and Texas (not including Dallas and Fort Worth), to Springdale, Lowell, and Fort Smith Ark., and Westville, Okla.

The proposed service is to be limited to a transportation service to be performed under a continuing contract or contracts with Steele Canning Company, of Springdale, Ark., Keystone Packing Company, of Fort Smith Ark., and Cain Canning Company, Inc., of Springdale, Ark., hereinafter called Steele, Keystone, and Cain respectively.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on June 23, 1958 and October 20, 1958, at Kansas City, Mo. Southwest Railroad Association, class I rail carriers in western trunkline territory, and 25 motor carriers<sup>1</sup> oppose the application.

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<sup>1</sup> Frisco Transportation Company, Watson Bros. Transportation Company, The Chief Freight Lines Company, East Texas Motor Freight Lines, Inc., and others.

Applicant holds no permanent motor carrier authority. Prior to March 19, 1946, he drove motor vehicles for certain motor carriers, and also repaired Army vehicles. From March 19, 1946 to about January 1, 1953, he owned about two tractors and trailers, and utilized the equipment in the transportation of exempt commodities, between unspecified points. During the period about January 1, 1953 to June 12, 1958, he leased tractor-trailers units to Steele under long-term arrangements. On June 12, 1958, he had nine tractor-trailer units under lease to Steele. Because of a strike at Steele's plants applicant obtained emergency authority for the period June 12, 1958, to July 28, 1958, authorizing the movement (1) of canned goods for Steele from Springdale, Lowell, Fort Smith, and Westville, to Baltimore, Md., Newark, N. J., and various specified points in the other States here involved, (2) of new tin cans and lids for Steele, from Chicago, Ill., Elwood, Ind., Norwood, Ohio, and Houston, Tex., to Springdale and Lowell, and (3) of corrugated fibreboard boxes for Steele, from Monroe, La., and Memphis, to Springdale and Lowell. This authority was extended to September 26, 1958. On July 21, 1958, he obtained temporary authority to serve Steele for a period of 90 days beginning July 28, 1958, in the movement of canned goods, in pool-truck shipments, from the origin points to the destination points mentioned in (1) above. The temporary has been extended and is now conditioned to expire upon final determination of the issues involved in the instant proceeding.

Applicant has been transporting Steele's traffic under contract. For example, during the period June 14, 1958 to July 16, 1958, when applicant held emergency authority, he transported shipments of canned goods (1) from Springdale and Lowell to Baltimore, Philadelphia, Pa.; Charleston, W. Va., Newark, N. J., Denver, Colo., Tucson and Phoenix, Ariz., Tuxedo, Miss., and points in Ohio,

Wisconsin, Minnesota, Iowa, Illinois, Arkansas, Indiana, South Dakota, Kentucky, Missouri, Virginia, North Carolina, South Carolina, Tennessee, Nebraska, (2) from Fort Smith to Richmond and Norfolk, Va., goods, in pool-truck shipments, from the origin points to the destination points mentioned in (1) above, and (3) from Westville to Detroit, Mich., and points in Alabama, Georgia, Illinois, Indiana, and Arkansas. Practically all of these shipments were comprised of freight for delivery at two, three, or four points en route, including points in different States. During the same period he transported (1) shipments of cans and lids (a) from Chicago, Elwood, and Norwood to Springdale, and from Chicago and Elwood to Lowell, (2) five shipments of boxes from Memphis to Springdale, and (3) one shipment of dry beans from Alma, Mich., to Springdale. He proposes to handle similar traffic under contracts with Keystone and Cain. The proposed service, if authorized, will be limited to service for these three shippers.

Applicant has a garage and large parking lot in Springdale. He also has appropriate insurance, and maintains a safety program for the several drivers employed by him. His balance sheet as of June 30, 1958, shows total assets of \$92,902, and total liabilities of \$19,195 and a net worth of \$73,707. He is fit and able, financially and otherwise, properly to conduct the proposed operation.

The application is supported by Steele, Keystone, and Cain. Steele manufactures between 500,000 and 800,000 cases of canned fruits and vegetables yearly at its plant in Lowell, and ships the products from that plant and also from its storage warehouse at Springdale to numerous wholesalers, and retailers, including supermarkets and chain stores at points in the States here involved. Because the customers' orders far exceed the capacity of its plant, it purchases annually (1) between 400,000 and 600,000 cases of canned vegetables from Cain at Spring-

dale, (2) between 300,000 and 500,000 cases of canned vegetables from Keystone at Fort Smith, (3) between 800,000 and 900,000 cases of canned dry beans, and canned pork and beans from Baron Canning Company at Westville, and (4) between 500,000 and 700,000 cases of canned fruits and vegetables from Springdale Canning Company at Springdale. It takes title to the goods at the plants of the suppliers, and selects the carrier for the movement direct to the customers, and also for movement to its warehouse in Springdale and reshipment from that point to customers. On occasion it also purchases canned goods including canned spaghetti, from canneries in the "Ozark area" and other sources of supply, for distribution to customers from Springdale and Lowell. For example, it receives (1) canned kraut from Chiocton, Wis., (2) canned corn from Tripoli, Iowa, (3) canned spaghetti from Belleville, Ill., (4) canned beans from unspecified points in the Rio Grande Valley of Texas, and (5) canned vegetables from Laurel, Miss., Haskell and Muskogee, Okla., Cumberland, Tenn., Gillette and Frederic, Wis., Benton Harbor, Mich., and Alma and Fort Smith, Ark.

Steele also obtains canned tomato paste from several sources of supply in California for use in the manufacture of certain canned goods. In addition, it purchases other materials and supplies at available sources of supply for use in the manufacture, labeling, packaging, and transporting canned goods. It is constantly purchasing the labels used by numerous customers who demand that shipper pickup the labels when it delivers an order of canned goods at the consignee's warehouses so as to have the labels available at shipper's plant for use on the next order made by the customer, and avoid the possibility of delays. The labels used on canned goods sold under Steele's trade name are purchased at Peoria, Ill., Bedford, Va., Omaha, Nebr., Cincinnati, Ohio, and unspecified points. Most of Steele's labels are purchased at Peoria and Omaha. Shipments of the labels range from about



30 pounds to 12,000 pounds in weight. Fresh fruits and vegetables are purchased principally at points within 100 miles of Springdale, and in practically all instances the suppliers in that area make delivery in their own equipment to Steele's warehouse at Springdale. It also has occasion to purchase fresh fruits and vegetables in other areas. It has obtained (1) blackberries from Tyler, Tex., (2) irish potatoes from unspecified points in Florida, Alabama, Colorado, Nebraska, South Dakota and Minnesota, (3) sweet potatoes from unspecified points in Louisiana, Alabama, Tennessee, North Carolina, South Carolina, New Mexico and Texas, (4) dry beans from unspecified points in Michigan, Nebraska, Colorado, Missouri, and California, (5) boysenberries and strawberries from unspecified points in Arkansas, Oklahoma, and Missouri, (6) raw spinach from unspecified points in the Rio Grande Valley, and (7) fresh peas from unspecified points in Texas. In addition to above-mentioned inbound freight, it purchases, (1) caustic soda at Beloco, Tex., (2) salt at Grand Saline, Tex., Rittman, Ohio and Hutchinson, Kans., (3) sugar at several points in Louisiana, principally Shreveport, (4) corrugated boxes at West Monroe, La., Memphis, and Fort Smith, and (5) tin cans and lids at Norwood and Cincinnati, Ohio, Elwood, Chicago, Milwaukee, Wis., Mankato, Minn., Houston, Tampa, Fla., Harvey, La., and Springdale. It obtains title to all inbound materials and supplies at the source of supply, and selects the carrier for the inbound movements. All of the materials and supplies, except fresh fruits and vegetables, are shipped to the plants at Springdale, Lowell, Fort Smith and Westville for use in the manufacture, labeling, and packaging of the canned goods purchased or produced by Steele. The fresh produce moves to Steele's warehouse at Springdale. The inbound traffic, other than labels, moves principally in straight truckloads. In some instances a small volume of labels or cans will move in the same vehicle with other inbound freight including damaged or rejected canned goods. It ships a substantial volume of canned

goods, in straight truckloads, from Springdale, Lowell, Fort Smith and Westville to points in the States here involved. It also ships a substantial volume of this traffic, in pool-loads from the four points mentioned immediately above to numerous points in the States here involved. A pool-load is comprised of small volume orders of several customers, and a pool-shipment requires up to six or more stops en route for delivery to consignees in two or more States. It frequently obtains customers at new locations. At the time of hearing it had canned goods' customers (1) at Newark and Kearney, N. J., and Baltimore, (2) at five points in Pennsylvania, (3) at seven points each in Colorado and Florida, (4) at 10 points each in Nebraska and New Mexico, and (5) at various points in the other States here involved.

Rail service is seldom used because Steele requires prompt motor carrier service for the movement of the inbound and outbound traffic here involved. It is obtaining satisfactory service from the existing motor common carriers on straight truckload shipments of canned goods from and to the points here involved, and the record indicates that some of these motor carriers have provided satisfactory service on some truckload shipments which required stopoffs for delivery of a portion of the freight at one or two points en route to final destination. It depends primarily on Jones Truck Line, Inc., hereinafter called Jones, to pick up this traffic at Springdale, Lowell, Fort Smith and Westville. Jones provides service to authorized destination points, and selects the connecting carriers for joint-line movements to points beyond its authorized territory. Steele will continue using the services of the existing motor carriers on these truckload shipments of canned goods from Springdale, Lowell, Fort Smith and Westlake to destination points.

Steele professes a need for the proposed service on the outbound shipments of canned goods which must be con-

solidated into pool loads and delivered at several points en route, and also on shipments of its inbound traffic the movement of which must be coordinated with shipper's production and shipping schedules on its outbound traffic. The average order of numerous customers who purchase its canned goods, including a large number of consignees located at off-rail points, ranges from 3,000 pounds to 10,000 pounds each. These small-order customers, which have increased substantially since 1948, normally operate on a 10 day supply, and prompt delivery of new orders to replenish the stock must be provided by shipper on specified delivery dates so as to satisfy the demands of the customers and avoid a loss of an account to anyone of several competitors who make prompt delivery of their traffic by private carriage. Because of the competitive situation, and the small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that shipper would be forced out of business if it had to ship the numerous small orders of canned goods, in less-than-truckload quantities, at less-than-truckload rates, and that successful operation of its business necessitates the movement of this traffic in consolidated loads either by private carriage, or by for-hire motor carriers at truckload rates. Based on information obtained by shippers' representative in his contract with several existing motor carriers in the past several years, he is convinced that none of the existing motor carriers are able to meet shipper's transportation requirements on its inbound traffic, and the numerous outbound shipments of the small-order freight here involved.

In 1948, Steele purchased two tractors and two trailers for use in the movement of the small-order traffic in consolidated loads, which enables it to operate economically and provide prompt delivery service in the same vehicle to several customers en route. As the volume of small orders increased, shipper acquired additional equipment. About January 1, 1958, it was operating 29 tractors and 29 trailers, including nine tractor-trailer units leased from appli-

cant, and it was handling outbound and inbound traffic to and from various points in the States here involved. Because of a strike at the plants, which began about March 1, 1958 and was continuing at the time of last hearing, on October 21, 1958. [sic] Steele's private carrier fleet had been reduced to eight tractor-trailer units on the latter date, and applicant was using nine tractor-trailer units to handle some of shippers inbound and outbound traffic under temporary authority. As shown above, during the period June 14 to July 16, 1958, applicant transported a substantial volume of Steele's small-order traffic in consolidated loads, and some shipments of inbound freight under emergency authority, and at the time of the last hearing he held temporary authority for the movement of shipper's outbound traffic. The service rendered by applicant under emergency and temporary authority is substantially similar to the private carrier operations performed by Steele. Shipper is desirous of discontinuing all private carrier operations, and to utilize applicant as a substitute therefor. It will enter into an appropriate contract with applicant if the authority sought was granted.

Steele's freight has been solicited by several motor carriers. Its representative is unfamiliar with the authorized services provided by some of the opposing motor carriers. He is aware that Wright Motor Lines, and Loving Truck Lines, hereinafter called Wright and Loving, respectively, are authorized to transport the traffic here involved to and from some points in Colorado; however, Steele has not used the service of that carrier chiefly for the reasons that motor carriers now domiciled in the Arkansas area could handle the small volume of traffic shipped by it to and from Colorado points, that about October 3, 1958, Steele's representative contacted an employee of Loving for the purpose of determining whether that carrier could handle a shipment originating at Springdale and consisting of canned goods for customers at Davenport, Iowa.

and Galesburg, Ill., and from his conversation with the carrier's employee he understood that Loving had authority to transport shipper's traffic to and from Colorado points, that it had no interchange arrangements with any motor carriers at Kansas City, and that it was willing to deliver the shipment mentioned above to a connecting carrier at Denver. Routing of the shipment via Denver would be circuitous and impractical. Some shipments made in the past to Colorado points have contained freight for delivery en route at Kansas points. He mentioned situations where some of the opposing carriers would be unable to render complete service on a consolidated shipment of canned goods. For example, he points out that Frisco Transportation Company, hereinafter called Frisco, has no authority to serve Westville, and that shipper has occasion to ship canned goods in the same vehicle from Springdale and Westville to customers at certain points including Ada, Okla., Memphis, Tenn., and points in Texas. Shipper has received some complaints from customers in respect of delays and damages on less-than-truckload shipments of canned goods which moved in joint-line hauls. It prefers single-line service for the movement of all traffic. From his discussions with Jones, and also with Arkansas-Best Freight System, Inc., Campbell Sixty-Six Express, Inc., and M. & A. Transportation Company, hereinafter called Best, Campbell, and M. & A., respectively, shipper's representative has concluded that the only possible way to utilize these carriers for the movement of a substantial volume of the small-order traffic is to ship the freight in less-than-truckload quantities at prohibitive rates;

Cain produces between 500,000 and 600,000 cases of canned vegetables yearly at its plant in Springdale. Prior to the commencement of the strike mentioned above, about 75 percent of the production was sold to and shipped by Steele, and 25 percent was sold to customers who picked up their freight at the plant. Since the strike began, the

volume of sales to Steele has been reduced about 10 per cent, and has resulted in a large excess inventory at Cain's plant. It is willing to provide the volume of canned goods which will be required by Steele in the future; however, it is desirous of selling and shipping a substantial portion of its production to customers at various points in the States here involved so as not to be dependent on one or more large customers for the sale of its canned goods. It recalled that many dealers in canned goods order their supplies in less-than-truckload quantities, that since about June 1, 1958, it had made several shipments in straight truckloads to customers at Chicago, Kansas City, and St. Louis, and that it receives a small volume of inbound freight. Shipper has the conviction that it could not successfully invade the territory here involved if it had to ship its canned goods in less than truckload quantities at less-than-truckload rates, that it would need a motor carrier that is able to handle the small-order traffic in pool loads, that it is unable to obtain the latter type of service from the existing motor carriers, and that applicant should be granted authority to handle its inbound traffic as well as the outbound freight because the inbound payload would enable the carrier to render a better service on the outbound movements. Admittedly, shipper is not very familiar with the services provided by the existing motor carriers. Its plant is not located on a rail siding.

Keystone produces between 400,000 and 500,000 cases of canned vegetables yearly at its plant in Fort Smith. Prior to the commencement of the strike mentioned about 75 percent of its products were purchased and shipped by Steele, and the remaining 25 percent was sold by Keystone and delivered by rail and motor carriers to customers at certain points in the territory here involved. Of the 25 percent mentioned above, 20 percent moved by motor carrier principally in straight truckloads, and 5 percent moved by rail. Its plant is located on a rail sid-



ing. It also purchases and receives fresh vegetables, and a small volume of salt, soda, sugar, cans and boxes. Its vegetables are delivered by the supplier, and the other inbound freight is handled in its own equipment and the facilities provided by the existing carriers.

Because of the strike, Steele has been purchasing between 60 and 65 percent of the plant's production, and Keystone has been selling and delivering a small portion of the excess stock in two new tractors and trailers purchased by it. At the time of hearing it had customers at Birmingham and Montgomery, Ala., Atlanta, Augusta and Savannah, Ga., Jacksonville and Miami, Fla., Carbondale, Kankakee, Peoria, Murphysboro, Springfield and Chicago, Ill., Indianapolis, Bloomington, Terre Haute and Vincennes, Ind., Topeka and Wichita, Kans., Lexington, Paducah, and Russell, Ky., New Orleans, La., Detroit, Jackson, Miss., Kansas City, Springfield, and St. Louis, Mo., Charlotte and Raleigh, N. C., Bellefontaine, Cincinnati, Cleveland, Columbus, Dayton, and Toledo, Ohio, Newark and Jersey City, N. J., Tulsa, Oklahoma City, Pittsburgh, Pa., Greenwood, S. C., Memphis and Nashville, Tenn., Dallas, Richmond, and one or more unspecified points in New York and West Virginia. Prior to June 1, 1958, shipper had not received many small orders; however, it is aware that numerous dealers order less-than-truckload quantities of canned goods from sources of supply, and it is desirous of soliciting and serving the small-order dealers in all States here involved. Shipper expressed the opinion that it would be unable to make single shipments of less-than-truckload traffic, because of the competitive situation and transportation costs; however, if the proposed service were authorized it would make an effort to obtain sales and ship the freight in pooled loads requiring delivery at two or more points en route. Shipper has obtained satisfactory service on shipments transported by the existing motor carriers in straight truckloads and loads requiring one or two stops en route;

however, it has the conviction that these carriers would be unable to provide adequate service on the type of traffic it proposes to ship in pool loads, and that it would be compelled to acquire a number of vehicles for the movement of this traffic in private carriage if the application was denied.

Each of the opposing rail and motor carriers, except Howard J. Nelsen and James Melvin Nelsen, a partnership, hereinafter called Nelsen Brothers, is authorized to operate as a common carrier of the commodities here involved and various other commodities, and each carrier operates a substantial amount of transport equipment. It was stipulated that L. A. Tucker Truck Lines Incorporated, hereinafter called Tucker, of Cape Girardeau, Mo., is operating over regular routes extending from Memphis to St. Louis via Blytheville, Ark., and Cairo, Ill., and from St. Louis to Evansville, Ind., serving intermediate points, that Be-Mac Transportation Company, Inc., hereinafter called Be-Mac, is operating over regular routes extending from Beloit, Wis., and Chicago to various points in Oklahoma, except Westville, serving all intermediate points including St. Louis, and that at the time of hearing Nelsen Brothers held a permit authorizing so far as here pertinent, operation as a contract carrier (1) of canned goods (a) from Nebraska City, Nebr., to points in six States including Arkansas and Oklahoma, (b) between Hamburg, Iowa, and Nebraska City, (c) from Grinnell and Atlantic, Iowa to Nebraska City, and (d) from Kansas City to Council Bluffs, Iowa, and six points in Nebraska.

Wright is authorized, so far as here material, to transport (1) sugar from Torrington, Swink, and Rocky Ford, Colo., to all points in Arkansas and Oklahoma, (2) fresh produce from points in Colorado to points in Arkansas and Oklahoma, and (3) canned goods, (a) from 10 points in Colorado to points in Oklahoma, (b) from Muskogee,

Okla., to points in Colorado, (c) from Springdale and Lowell to points in Colorado, and (d) from Springdale to points in New Mexico on and north of U. S. Highway 66, and those in Nebraska on and west of U. S. Highway 83. Shipments of canned goods moving from Fort Smith and Westville to points in the western portion of Colorado could be interchanged with Loving at Muskogee. It maintains a terminal at Rocky Ford, and operates equipment daily between authorized points. It handles between 6,000,000 and 7,000,000 pounds of canned goods annually for several shippers, including a substantial volume of freight for Welch Grape Juice Company, of Springdale, and has received no complaints. It also transports a substantial volume of the other commodities described above. It has not handled any freight for the supporting shippers; however, it is willing to serve these shippers. In 1953, it solicited Steele and was advised that that shipper was shipping all of its traffic by private carriage. After the application was filed Wright advised Steele by letter or telegram in respect of the availability of its service, and received no response. The handling of shipments which require split-deliveries en route is a common practice of Wright. The carrier concedes that under certain conditions it would not be able to handle a consolidated load of less-than-truckload traffic for Steele. For example, it could not handle a pool shipment of canned goods originating at Westville, Fort Smith, Springdale and Lowell and destined to one or more customers in Missouri, eastern Nebraska and western Nebraska.

Loving is authorized, so far as here pertinent, to tack certain authorities and transport the commodities here involved between points in Oklahoma, Kansas and Arkansas, on the one hand, and, on the other, points in Colorado on and east of U. S. Highway 87. It maintain terminals at Denver and Oklahoma City, and operates equipment daily to and from certain authorized points including those in the Tulsa area. It transports about 400,000

pounds of canned goods a month for certain shippers, including some freight for Welch Grape Juice Company, of Springdale, and provides multiple or split-delivery service. A truckload or a portion of a pooled load of less-than-truckload traffic destined to a point beyond its authorized territory would be interchanged with connecting carriers. For example, freight originating at Springdale and destined to points in the western portion of Colorado could be interchanged with Wright for delivery by the latter. Its representative could not recall any shipments of freight handled for the supporting shippers; however, it is willing to provide service for these shippers on inbound and outbound traffic.

Buckingham Transportation, Inc., Buckingham Express, Inc., and Buckingham Transfer, Inc., hereinafter called the Buckingham companies, are authorized so far as here material, to provide through service in the movement of general commodities, over combined regular and irregular routes extending from Omaha, Nebr., and Kansas City to various points in Illinois, Iowa, Nebraska, Minnesota and North Dakota, and those in the western portion of South Dakota, and several points in Missouri and Colorado, including Denver. They handle both large and small shipments of the type of traffic here involved, including a substantial volume of canned goods, and consistently provide multiple delivery service. Traffic is interchanged with connecting carriers. Freight moving to or from points in the eastern portion of South Dakota is interchanged with a connecting carrier at Sioux Falls, S. Dak. Freight is interlined at Kansas City with Best, Jones, and several other carriers. These carriers are unaware of any traffic handled for the supporting shippers; however, they are desirous of participating with connecting carriers in the movement of the traffic here involved.

Watson Bros. Transportation Co., Inc., hereinafter called Watson, is authorized to transport the commodi-

ties here involved and other traffic over regular routes extending from Minneapolis, Chicago, St. Louis and Kansas City, on the east, to a number of California points, on the west, via Denver, serving intermediate points in Illinois, Iowa, Missouri, Minnesota, Nebraska, Kansas, Colorado, New Mexico and Arizona. It maintains terminals at a number of points including Kansas City and St. Louis. Interchange traffic comprises about 60 percent of its volume of business. It handles the type of traffic here involved and provides multiple drop-off service. Trailers are interlined on shipments of truckload traffic. It has interchanged freight at Kansas City and St. Louis with several carriers including Campbell, M. & A., England Brothers, Frisco, and Jones. It is desirous of participating with these carriers in the movement of the supporting shippers' traffic. Its representative could not recall the last time it handled a shipment of canned goods which required delivery service at four or five points en route.

Frisco is a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. It is authorized to transport general commodities over regular routes roughly paralleling the rail lines of the railroad. Its routes extend (1) from Springfield, Mo., to a number of points in Missouri including St. Louis and Kansas City, (2) from Springfield to Baxter Springs, Kans., Oklahoma City, and Dallas, Tex., (3) from Springfield to Columbus, Miss., via Memphis, and (4) from Springfield to Alma, Ark., via Lowell and Springdale, serving various intermediate points. It has agents at a number of points including two points within 20 miles of Springdale. It handles the type of traffic here involved, and provides multiple delivery service. It has some idle equipment. It is desirous of serving the supporting shippers. It has no authority to serve Fort Smith or Westville. If a pool load of canned goods originated, for example, at Springdale and

Fort Smith, the freight shipped from the latter point would have to be picked up and delivered to Frisco by another carrier. Moreover, if Frisco were requested to deliver a pooled load consisting, for example, of canned goods moving to several consignees, including about 3,000 or 5,000 pounds for a consignee at a point not served direct by that carrier, the latter portion of the shipment would be transferred to a connecting carrier for delivery by the latter.

Best is authorized to transport general commodities over regular routes extending from a number of points in Ohio, Indiana, Illinois and Missouri, including Kansas City, to Houston and San Antonio, Tex., Greenville, Miss., Shreveport, La., Memphis, and numerous points in Arkansas, serving intermediate points including Fort Smith, Springdale and Lowell. It maintains terminals at several points including Fort Smith and Kansas City. It handles a substantial volume of traffic between authorized points, and interchanges traffic with several connecting carriers at Texarkana, Ark.-Tex., Kansas City, and certain other points. It is desirous of handling the inbound and outbound traffic of the supporting shippers. Admittedly, this carrier could not provide a complete pickup service on a consolidated load of canned goods originating, for example, at Springdale and Westville, because it has no authority to serve the latter point direct. No direct service is provided by Best on traffic shipped from Arkansas points to points in Texas. This traffic is interchanged with connecting carriers at Kansas City or Texarkana. It is aware that canned goods is one of the lowest revenue producing commodities handled by motor common carriers.

East Texas Motor Freight Lines, Inc., hereinafter called Texas Freight, is authorized to transport general commodities over regular routes extending from Chicago to Houston, San Antonio, Fort Worth, and Port Arthur, Tex., and Shreveport, via Memphis, Little Rock, and Tex-



arkana. It maintains terminals at several points including Dallas, Texarkana, St. Louis, and Little Rock, and has several pieces of equipment stationed at each terminal. It operates daily schedules, and transports truckload and less-than-truckload shipments of canned goods and other freight. Traffic moving to and from Springdale, Westville, and Texas points is interchanged at Texarkana with several carriers including Best. Trailers are interlined with Best and other carriers. It is also able to interchange inbound and outbound shipments of the supporting shipper's traffic with several carriers, including Best and Jones, at St. Louis, and with Jones at Little Rock. It offers, for example, second-morning delivery service from St. Louis and Memphis to Texas points. Its equipment is not operating to capacity. Some heavy loading freight is loaded and transported in the same vehicle with light loading freight, including tin cans, so as to increase the pay load. It is desirous of participating in the movement of the supporting shippers' traffic.

Gillette Motor Transport, Inc., and its affiliate Western Truck Lines, Inc., hereinafter called Gillette and Western, respectively, operate a combined through service in the movement of general commodities over regular routes extending from Kansas City to a number of points in California via Dallas, and El Paso, Tex., serving intermediate points. These carriers have no authority to serve Westville or any point in Arkansas direct; however, they are able and willing to participate with connecting carriers, principally Jones at Dallas, in the movement of the supporting shippers traffic. They operate daily schedules, and offer, for example, first-morning delivery service from Dallas to El Paso, and second-morning service from Dallas to points in Arizona and California. Their equipment is not operating to capacity.

Western Pacific Railroad Company, hereinafter called W. P., operates over rail lines extending for [sic] Salt Lake

City, Utah, to San Francisco and San Jose, Calif., via Elko, Nev. The Denver and Rio Grande Western Railroad Company, hereinafter called D.R.G., operates over rail lines extending from Denver and Pueblo, Colo., to Salt Lake City. Great Northern Railway Company, hereinafter called G.N., operates over rail lines extending from Yankton, S. Dak., Sioux City, and Chicago to points in Oregon and Washington via Minot, N. Dak. The Atchison, Topeka and Santa Fe Railway Company, hereinafter called Santa Fe, operates over rail lines extending from Chicago to points in California, Arizona, New Mexico, Texas, Louisiana and Colorado, serving intermediate points. These rail carriers operate freight schedules daily and provide drop-off service en route, and traffic is interchanged between these carriers and with other rail carriers. G.N. offers, for example, one-day service from Sioux City to points in Minnesota, North Dakota and Wisconsin, and Santa Fe offers, for example, next-morning delivery service from Dallas to El Paso, Tex., and second-morning service to points in Arizona and California. In 1957, Santa Fe participated in the movement of 19 carloads of canned goods from points in Arkansas and Oklahoma to California points, and 609 carloads of canned goods from points in California to points in Arkansas and Oklahoma. During the same period, W.P. participated in the movement of 41 carloads of canned goods from points in California to points in Arkansas, and one carload of beans, 20 carloads of canned goods, and 29 carloads of sugar from points in California to points in Oklahoma. They have experienced a decline in traffic, despite large expenditures in operating facilities. These carriers have no authority to service Westville or any point in Arkansas; however, they are desirous of participating with connecting carriers in the movement of the inbound and outbound traffic of the supporting shippers.

As seen, Steele is shipping a substantial amount of canned goods from Springdale, Lowell, Fort Smith and

Westville to a number of points in the States here involved. Some of this traffic is obtained from Cain at Springdale, and from Keystone at Fort Smith. It also ships tin cans and lids, can labels, salt, sugar, caustic soda, corrugated boxes, canned goods, and fresh fruits and vegetables from, various sources of supply in the territory here involved to the four origin points described above. A substantial number of Steele's customers order canned goods in small less-than-truckload quantities, and since about 1948 Steele has been transporting the small-order freight in pool loads, in private carriage, and each shipment requires stops for delivery at several points en route. Its equipment is also used for the movement of inbound freight. Since about June 1, 1958, shipper has also been using applicant under emergency and temporary authority for the movement of a portion of the small-order traffic and some inbound freight. Shipper's use of private carriage, and the service provided by applicant under emergency and temporary authority is based on its conviction that rail service is too slow and is otherwise unsatisfactory for the movement of any traffic handled by shipper, and that the existing motor carriers are unable to meet its transportation requirements on the pooled loads of the outbound traffic and on the inbound freight.

Since about June 1, 1958, Cain has made some shipments of canned goods from Springdale to customers at Chicago, Kansas City, and St. Louis, and it has received some inbound freight at its plant. If the proposed service were authorized, Cain would make an effort to sell and ship a substantial volume of canned goods to small-order customers in the States here involved. At the time of hearing, Keystone was shipping a fairly substantial volume of canned goods from its plant at Fort Smith to points in a number of States here involved, and it was receiving some inbound freight. If the proposed service were authorized, shipper would expand its sales efforts

in the States here involved, primarily in respect of small-order traffic. Cain and Keystone also have the conviction that the existing rail and motor carriers are unable to provide adequate service on shipments of the small-order traffic.

True, the opposing rail and motor carriers operate daily between points in a portion of the territory here involved; however, the record indicates that the proposed service will be more responsive to shipper's transportation requirements. All things considered, the examiner concludes that the evidence warrants a grant of authority to the extent hereinafter indicated, and it does not appear that such a grant will have any material adverse affect [sic] upon the operations of any other carrier.

The examiner finds that operation in interstate or foreign commerce by applicant as a contract carrier by motor vehicle, over irregular routes, under a continuing contract or contracts with Steele Canning Company, of Springdale, Ark., Keystone Packing Company, of Fort Smith, Ark., and Cain Canning Company, Inc., of Springdale, Ark., of the commodities described and in the manner described in appendix A hereto, will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that a permit authorizing such operations should be granted; and that the application in all other respects should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By H. L. Hanback, Hearing Examiner.

(Signature) H. L. Hanback

## APPENDIX A

- (1).—Canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois except Chicago, Ill., Indiana, Iowa, Kansas except Wichita, Kans., Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri except St. Louis, Kansas City, Springfield, and Joplin, Mo., Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma except Oklahoma City and Tulsa, Okla., Pennsylvania, Tennessee except Memphis, Tenn., Texas except Dallas and Fort Worth, Tex., Virginia, West Virginia, and Wisconsin, over irregular routes.
- (2).—Canned goods, and materials and supplies used in manufacturing, labeling, packing, and transporting canned goods, from the destination points described in (1) above, except those in Virginia, West Virginia and Wisconsin, to Springdale, Lowell and Fort Smith, Ark., and Westville, Okla., over irregular routes.
- (3).—Tin cans and lids from Chicago, Ill., to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., over irregular routes.
- (4).—Corrugated fibreboard boxes, from Memphis, Tenn., to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., over irregular routes.

## RESTRICTIONS:

The operating authority described above shall be limited to a transportation service to be performed under a continuing contract or contracts (a) with Steele Canning Company, of Springdale, Ark., on

traffic moving from and to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., (b) with Keystone Packing Company, of Fort Smith, Ark., on traffic moving from and to Fort Smith, and (c) with Cain Canning Company, Inc., of Springdale, Ark., on traffic moving from and to Springdale.

**Recommended by H. L. Hanback,  
Hearing Examiner.**

**(Signature) H.L. Hanback**



**No. MC-117391**

**HAROLD D. MCCOY.**  
Secretary.

(SÉAL.)

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**SUPREME COURT. U. S.**

49,53,54  
Nos. 711, 720, 725

Office Supreme Court, U.S.

**FILED**

**MAR 17 1961**

**JAMES R. BROWNING, Clerk**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1960**

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY, ET AL., APPELLANTS**

**v.**

**ELVIN L. REDDISH, ET AL.**

**INTERSTATE COMMERCE COMMISSION, APPELLANT**

**v.**

**ELVIN L. REDDISH, ET AL.**

**ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,  
APPELLANTS**

**v.**

**ELVIN L. REDDISH, ET AL.**

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF ARKANSAS—FORT SMITH DIVISION**

---

**MEMORANDUM FOR THE UNITED STATES**

**ARMONIALD COX,**

**Solicitor General,**

**Department of Justice, Washington 25, D.C.**

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1960

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No. 714

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY, ET AL., APPELLANTS**

v.

**ELVIN L. REDDISH, ET AL.**

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No. 723

**INTERSTATE COMMERCE COMMISSION, APPELLANT**

v.

**ELVIN L. REDDISH, ET AL.**

---

No. 725

**ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,  
APPELLANTS**

v.

**ELVIN L. REDDISH, ET AL.**

---

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF ARKANSAS—FORT SMITH DIVISION**

---

## **MEMORANDUM FOR THE UNITED STATES**

---

The above appeals are from the judgment of a three-judge district court which set aside orders of the Interstate Commerce Commission denying an application for a permit to operate as a contract car-

rier by motor. The court held (1) that § 209(b) of the Interstate Commerce Act, as amended in 1957, 49 U.S.C. 309(b), does not permit the "adequacy of existing service" test which the Commission applied in determining whether issuance of the requested permit will be consistent with the public interest, and (2) that under the amended section the Commission erred in treating as irrelevant the consideration that grant of the contract carrier application would enable the supporting shippers to obtain transportation service meeting their distinct needs at a materially lower cost than by utilizing the services of existing common carriers.

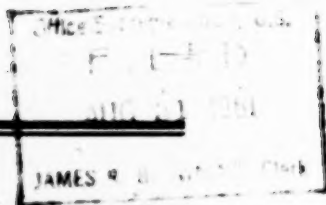
In the district court, the United States supported the plaintiff (appellee Elvin L. Reddish). For present purposes, it suffices to note that the appeals present questions, involving the proper construction of certain 1957 amendments to the Interstate Commerce Act, which are of public importance and should be determined by this Court. One of the questions presented is the same as the basic issue involved in *Interstate Commerce Commission v. J-T Transport Company, Inc.* and *U.S.A.C. Transport, Inc. v. J-T Transport Company, Inc.* (Nos. 563 and 564, this Term), in which the Court noted probable jurisdiction of the appeals on February 20, 1961. We therefore suggest that the Court should note probable jurisdiction of the present appeals.

Respectfully submitted.

ARCHIBALD COX,  
Solicitor General.

MARCH 1961.

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SUPREME COURT, U. S.



IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 49

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY, ET AL.,**

*Appellants,*

VS.

**ELVIN L. REDDISH, ET AL.,**

*Appellees.*

Appeal from the United States District Court  
for the Western District of Arkansas

## APPELLANTS' BRIEF

AMOS M. MATHEWS

ED WHITE

JAMES W. NISBET

280 Union Station Building  
Chicago 6, Illinois

E. L. RYAN, JR.

La Salle Street Station  
Chicago 5, Illinois

*Attorneys for Appellants*

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1961

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**No. 49**

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**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY, ET AL.,**

*Appellants,*

VS.

**ELVIN L. REDDISH, ET AL.,**

*Appellees.*

---

Appeal from the United States District Court  
for the Western District of Arkansas

---

**APPELLANTS' BRIEF**

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OPINIONS BELOW

The opinion of the District Court (R. 398) is reported in 188 F. Supp. 160, the report of the Interstate Commerce Commission (R. 385) in 81 M.C.C. 35.

JURISDICTION

Probable jurisdiction was noted April 17, 1961, 365 U.S. 877 (R. 421). This is an appeal under 28 U.S.C. § § 1253 and 2101(b) from a final judgment of the District Court entered October 19, 1960 (R. 411), that permanently enjoined en-



forcement of an order of the Interstate Commerce Commission. Notice of appeal was filed December 16, 1960 (R. 416).

### ASSOCIATED CASES

By the order noting probable jurisdiction the Court consolidated this case with Nos. 53 and 54, which are separate appeals from the same judgment by the Commission and by Arkansas-Best Freight System and others (R. 421).

### STATUTES INVOLVED

This appeal is concerned largely with the construction of the amendments of August 22, 1957, to § § 203 (a) (15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. § § 303(a) (15), 309 (b), 71 Stat. 411-412, Public Law 85-163, and also involves construction of the National Transportation Policy, 49 U.S.C. preceding § 1, 54 Stat. 899. These statutes are set forth in the Appendix, p. 53, with the changes made by the 1957 amendment fully shown.

### QUESTIONS PRESENTED

The Commission denied an application for motor contract carrier authority under § 209(b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), on the grounds (1) that the service proposed can be performed adequately by existing motor common carriers and rail carriers, (2) that since the existing service is adequate the supporting shippers would not be adversely affected by denial, (3) that carriers providing adequate services would be adversely affected by a grant of new authority, and (4) that the comparative level of proposed and existing motor carrier rates is not a factor to be considered in this case in determining adequacy of existing service. In setting aside the order the District Court held that the 1957 amendment to § 209(b) forbids consideration of

adequacy of existing service. With the background of this statutory construction, the Court held that denial would adversely affect the supporting shippers in respect of service and rates and that a grant would not adversely affect protesting carriers.

The questions presented are :

1. Whether the 1957 amendment to § 209(b) precludes consideration of existing service of motor and rail carriers in determining whether denial of an application for contract carrier authority would adversely affect supporting shippers.

2. Whether the District Court erred in setting aside the Commission's findings :

(a) That the service proposed can be performed adequately by existing motor common carriers and rail carriers.

(b) That denial of the application would not adversely affect the supporting shippers.

(c) That a grant of authority would adversely affect existing carriers.

(d) That the comparative level of proposed and existing motor carrier rates is not a factor to be considered in this case in determining adequacy of existing service.

## **STATEMENT OF THE CASE**

### **PROCEEDINGS BELOW**

Appellee E. L. Reddish filed an application under § 209 (b) of the Interstate Commerce Act, 49 U.S.C. § 309(b), for a permit to engage in the business of contract carrier by motor vehicle (R. 23-36). The application was opposed by appellant railroads and motor common carriers (R. 387).

After a hearing the Examiner issued a proposed report and order recommending grant of the application on the general ground that need for the service had been shown (R. 365). The protesting carriers filed exceptions (R. 387). The Commission, Division 1, denied the application, 81 M. C. C. 35, on the grounds that since existing transportation service is adequate denial would not adversely affect supporting shippers but would adversely affect existing carriers, and that the comparative level of proposed and existing motor carrier rates is not material (R. 385). The entire Commission denied applicant's petition for reconsideration (R. 396).

Reddish then instituted this suit in the District Court under 28 U.S.C. § § 1336, 1398, 2284, 2321-2325, to set aside the order (R. 1). The railroads and protesting motor carriers intervened in defense (R. 399). The Court annulled the order and remanded to the Commission, 188 F. Supp. 160, holding that the 1957 amendment to § 209(b) forbids consideration of adequacy of existing service, that denial would adversely affect supporting shippers, and that granting the application would not adversely affect existing carriers (R. 398). The Commission, the railroads, and the motor carriers took separate appeals (R. 412, 416, 418), and this Court noted probable jurisdiction (R. 421).

## EVIDENCE

### REDDISH AND STEELE CANNING COMPANY

Reddish sought authority (1) to carry canned goods from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to points in 33 states, and (2) in the reverse direction to carry canned goods and materials and supplies used in the manufacture of canned goods from 30 of these states to the 4 points in Arkansas and Oklahoma (R. 38-39, 386). The service would be performed under

continuing contracts with Steele Canning Company of Springdale and Lowell, with Cain Canning Company of Springdale, and with Keystone Packing Company of Fort Smith, all in Arkansas (R. 39). Canned goods would be picked up for Steele as shipper at the Baron Packing Company in Westville, Oklahoma (R. 116).

From 1948 to June, 1958, Steele shipped its products outbound by motor common carrier, railroad, and its own private trucks (R. 134-135). From time to time it increased the number of its private trucks to take care of its growing small order business (R. 135). In 1957 and the first half of 1958 3 to 5 per cent of its outbound traffic moved by railroad, about 17 to 20 per cent by common carrier trucks, and the balance, nearly 80 per cent, moved by trucks operated by Steele in private carriage (R. 207-209). In January, 1958, Steele was operating 29 tractor-trailer combinations in its private carriage, 13 combinations being owned by Steele and the rest being leased to Steele by various owners including E. L. Reddish (R. 157). Reddish was leasing 9 combinations to Steele early in 1958 under leases for one year with provisions for cancellation by either party on 30 days notice (R. 51).

Reddish had commenced leasing vehicles to Steele in 1953 with 3 vehicles, and thereafter leased additional vehicles to Steele from time to time; Reddish maintained the vehicles and supplied gas, oil, and tires, and was paid on a mileage basis; Steele hired, discharged, and supervised the drivers and carried public liability insurance on the vehicles (R. 50-52). Before 1940 Reddish worked as an assistant to his father in the latter's motor common carrier business, which was sold in 1940; thereafter he worked as a truck driver and mechanic and for several years before 1953 he was operating 3 combinations in the transportation

of exempt commodities until he leased the combinations to Steele (R. 49-50).

Early in 1958 Steele and its truck drivers had a labor dispute, and in March of that year in an election supervised by the National Labor Relations Board the drivers voted to make the Teamsters Union their bargaining agent, pursuant to which the Board so certified the Union (R. 158, 200). A further labor dispute was followed by a strike of drivers and picketing of the Steele plants; the strike has continued and Steele and the Union have not entered into an employment agreement (R. 158-159, 169).

The strike severely curtailed Steele's transportation operations beginning about May, 1958 (R. 57, 159-161). As a result Steele suggested to Reddish that the instant application for contract carrier authority be filed, and it was filed May 13, 1958 (R. 57). Reddish also applied for emergency operating authority to perform the proposed operations for Steele and this was granted on June 13, 1958 (R. 58). Reddish has been operating under emergency and temporary authority since that time, using the nine tractor-trailer combinations formerly leased to Steele; the leases were terminated and he no longer has any vehicle equipment under lease to Steele (R. 52-53, 58, 204). Reddish employs 19 drivers, all of them non-union drivers (R. 58, 72).

Steele still operates 8 combinations in private carriage, 5 owned and 3 leased (R. 159, 163, 169, 207). Since the strike began substantially the same outbound traffic pattern has continued, about 80 per cent by Steele's and Reddish's vehicles and almost 20 per cent by motor common carrier (R. 209).

Steele's products are sold through food brokers to wholesalers, chain stores, and the larger supermarkets (R. 125). Steele arranges for the transportation to customers

(R. 126). About 80 per cent of the customers buy in orders from 3,000 to 10,000 pounds per order, the minimum order which Steele will ship being 3,000 pounds which represents 100 cases (R. 126). The customers are located in the 33 destination states (R. 126). The small volume business is one of the best sources for Steele's sales; these customers work on a ten-day supply of canned goods and Steele must supply these goods on that basis in order to meet competition; some customers do not have warehouse space or financial backing to stock larger amounts (R. 127). Some customers specify the day of the week or the time of day when they want their merchandise delivered (R. 128).

Steele uses Jones Truck Line, Inc., of Springdale, for most of the traffic it ships by motor common carrier; this consists of straight truckload shipments and many shipments that have a destination and two intermediate stops (R. 132-134). Steele uses Jones because Jones' principal office is at Springdale (R. 134, 199). Jones arranges for interline with other truck lines where Jones' line does not extend to the destination points, and Steele does not know **who these interlining motor carriers are** (R. 187, 192-193, 210-211). Steele has not investigated and has no knowledge of the services available from motor carriers who do not render direct service to Springdale (R. 185, 187).

Steele's vice-president and general manager testified that in their experience the only way they have found it possible to use motor common carriers on the small orders ranging from 3,000 to 10,000 pounds is to ship them in less-truckload lots, and that at their destination points it is impossible to get quick service on common carrier l. t. l. shipments (R. 133). For this reason, he said, as a necessary means for holding their business, Steele developed its fleet of private carrier trucks to deliver these small orders (R. 134-135). Steele's competitors, he said, deliver a portion



of their products by means of their own private trucks (148). The labor dispute with their truck drivers and the election and designation of the Teamsters Union as the drivers' bargaining agent, he testified, caused Steele to decide to get out of the private carriage business as soon as possible and to promote the filing of Reddish's application (R. 159-163). He feels that the proposed Reddish service is necessary to the continuing of Steele's operation on its present scale (R. 165-166). He further stated that freight rates on motor common carrier less-truckload shipments are prohibitive (R. 173).

The only evidence in the record as to the rates which Reddish proposes to charge and as to motor common carrier rates is the following. Certain rates are shown from Springdale to 4 Ohio points (R. 83-84, 353-354), and certain of Reddish's rates are the same as motor common carrier rates for the same service (R. 191). There is no evidence in the record showing the ability of Reddish to operate under whatever rates he proposes to charge.

Steele has made no attempt to inform itself as to the services and rates of a large number of motor common carriers serving substantially all of the involved territory (R. 153-155, 185-188, 192, 201, 210-211, 375-380, 391-392). These carriers and the rail carriers introduced evidence as to their facilities and their ability to carry the traffic involved (R. 270-363, 375-380, 391-392).

Steele supports Reddish's application for authority to perform the inbound transportation of materials and supplies because limited warehouse space makes it necessary to correlate these movements with the outbound traffic and because it wants to enable Reddish to obtain revenue on the return movements of his equipment (R. 171). The inbound traffic has been carried by producers who sell to

Steele, by Steele's private trucks, by motor common carriers, and by railroads (R. 140-144). During the time Reddish has been operating under the temporary contract carrier authority he has carried exempt commodities on the backhaul (R. 108, 164); and during this time Steele has been carrying practically all of its own inbound traffic in non-exempt commodities in the trucks it operates in private carriage (R. 188, 203, 209-210).

Reddish will not dedicate any piece of his equipment to any one of the three supporting shippers but will alternate his equipment among the three on outbound movements; on inbound trips Reddish will haul exempt commodities for other shippers and these other shippers will pay the freight charges on the exempt commodities (R. 107-108).

#### CAIN CANNING COMPANY

Before the strike at Steele Canning Company 85 per cent of Cain Canning Company's products were sold to Steele, and the remainder to other canners (R. 213-214). These buyers picked up their merchandise at Cain's plant and Cain furnished no transportation and had no trucks of its own (R. 214-215). Cain's plant is not on a rail siding (R. 215). Since the strike Cain has been carrying canned goods to the Steele plant in Cain's trucks and has been making direct sales to customers and using Jones Truck Lines for deliveries, but has not been able to accept small orders because they have no way of moving them in truckload shipments (R. 216-217). Cain supports Reddish's application in order to be able to develop sales of its own (R. 217). If the Reddish application is not granted it is the opinion of Cain's witness that they would have to go into the private carriage business to sell their products because the quantities bought are so small (R. 217-218). Cain supports Reddish's application to haul materials and supplies inbound to Cain's plant

so that Reddish may have backhaul traffic and in order to have prompt inbound service on cans and boxes for which they have limited storage facilities (R. 221).

Cain wants to make direct sales to customers in the territory covered by the Reddish application, but Cain has no knowledge of and has made no investigation of the transportation service available throughout that territory (R. 224-226, 228, 229, 231). Cain's witness expressed the opinion that motor common carrier less-truckload service is not usable because l. t. l. rates are prohibitive (R. 228).

#### KEYSTONE PACKING COMPANY

Keystone Packing Company, Fort Smith, Arkansas, sold Steele 75 per cent of its canned goods before the strike at Steele's; the other 25 per cent was sold direct to customers in many of the states involved in Reddish's application (R. 238-241). The transportation of Steele's 75 per cent was arranged by Steele and was performed by Steele's trucks, railroads, and motor common carriers; of the remainder, 5 per cent of the total output moved by rail and 20 per cent by motor common carrier (R. 243). When the strike curtailed Steele's private carrier operations Keystone bought two new trucks which it has used in delivering its products to customers and this has offset the drop in Steele's purchases (R. 242-243). If Reddish's application is granted Keystone will use that service and will discontinue private carriage (R. 244). They use motor common carriers regularly and have talked with three about service to certain points (R. 244).

Keystone's private carriage shipments are mostly straight truckloads with 2 to 4 drop-offs (R. 245). Many of its customers specify the day and some the hour when they want deliveries made, and Keystone's witness believes that

it is necessary to give this kind of service in order to retain the business (R. 245). The witness feels that the service that Reddish proposes will make possible the deliveries of small orders needed in their business, and that if the application is denied they will have to buy more trucks to make their own deliveries (R. 249-250). Keystone buys its fresh vegetables from producers who deliver them to the canning factory; Keystone wants Reddish's proposed in-bound service to bring in cans and the witness believes this service will be faster than rail or motor common carrier service (R. 250-251).

Keystone has no knowledge of and has made no efforts to obtain information about motor carrier or railroad service throughout most of the territory covered by the Reddish application (R. 251-255, 258, 261, 266, 267).

#### PROTESTING CARRIERS

Protesting motor common carriers introduced evidence respecting their territorial authorities and their facilities. These are L. A. Tucker Truck Lines (R. 270, 375); Be-Mac Transportation Co. (R. 271, 376); Wright Motor Lines, Inc. (R. 272-279, 376); Loving Truck Lines (R. 286-292, 377); several associated and commonly managed corporations known as Buckingham Freight System (R. 301-305, 377); Watson Brothers Transportation Company (R. 308-312, 378); Frisco Transportation Company (R. 314-317, 378); Arkansas Best Freight System, Inc. (R. 321-326, 379); East Texas Motor Freight Lines, Inc. (R. 336-341, 379); Gillette Motor Truck Lines and Western Truck Lines, the former being a subsidiary of the latter (R. 346-354, 380). Nelsen Brothers, a partnership, and a contract carrier, introduced similar evidence (R. 272, 376). Western Pacific Railroad Company (R. 328-331, 380); Denver & Rio Grande Western Railroad Company (R. 334, 380); Great Northern Railroad

Company (R. 359-361, 380); Atchison, Topeka and Santa Fe Railway Company (R. 361-363, 381); introduced similar evidence.

Each of the protesting motor carriers has authority to carry canned goods and the other commodities here involved (R. 391). Wright, Loving, Frisco, and Arkansas-Best each serve directly one or more of the four origin points of Springfield, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma (R. 274-275, 289-290, 315, 325). They have authority collectively to carry canned goods from these origins directly to points in Colorado, New Mexico, Oklahoma, Nebraska, Missouri, Kansas, Ohio, Indiana, Illinois, Texas, Tennessee, Mississippi, Louisiana, and Arkansas (R. 274-276, 289-291, 315-316, 322-324).

These originating carriers can by interline with each other and with Tucker, Be-Mac, Buckingham, Watson, East Texas, and Gillette-Western provide service from the four origin points to points in Iowa, Wisconsin, Minnesota, North Dakota, South Dakota, California, New Mexico, Arizona, Wyoming, Montana, Nevada, and also points in the states first named (R. 375-376, 275, 279, 289, 302-305, 309-311, 316, 324-325, 337-341, 349-352).

Wright, Loving, Frisco, and Arkansas-Best have equipment available daily in Arkansas and Oklahoma and operate daily schedules (R. 277, 290, 316, 322). The protesting motor carriers are performing split-load and multiple pick-up and drop-off services for others satisfactorily and believe they can provide adequate service for the supporting shippers (R. 278-279, 290-292, 303-305, 310-311, 316-317, 325, 340, 354). They can carry inbound freight such as sugar, salt, cans, cartons, labels and canned goods to the four origin points (R. 275-276, 291, 304, 311, 317, 326, 340-341, 354).

Western Pacific Railroad, Denver & Rio Grande, Great

Northern, and Santa Fe on their own lines and in interline with other railroads operate extensively throughout the involved territory (R. 380-381, 392). They have carried canned goods, sugar, cans, crates, salt and caustic soda in the area concerned and provide stop-off in transit and other special services; this is highly valuable traffic for them which they need to retain (R. 330-331, 335-336, 360, 362-363, 144). Railroads have carried about 5 per cent of the outbound traffic of Steele and Keystone (R. 207, 243) and a larger proportion of their inbound freight (R. 144, 251, 392).



**SUMMARY OF ARGUMENT****I**

Section 209(b) of the Interstate Commerce Act, prior to 1957, required as the standard for grant of a motor contract carrier permit "that the proposed operation . . . will be consistent with the public interest and the national transportation policy." The 1957 amendment provides that in making this determination the Commission shall consider five criteria, among them "the effect which denying the permit would have upon the . . . shipper." The Commission denied Reddish's application upon the ground, among others, that since the existing services of motor common carriers and rail carriers are adequate for the shippers' needs denial would not adversely affect the shippers. The District Court held that the adequacy of existing service test "is a test proscribed by the legislative history" of the 1957 amendment. The Court held, relying on legislative history, that the five criteria established new and exclusive standards for determination of § 209(b) applications.

The Court erred in three particulars. (1) The criterion of the 1957 amendment, "the effect which denying the permit would have upon the . . . shipper" so plainly includes as an inseparable element the question of adequacy of existing service that resort to legislative history for construction is not permissible. (2) The five criteria of the 1957 amendment did not establish exclusive standards and did not destroy the principle of twenty years standing that in determining whether a contract carrier permit shall be issued the Commission must consider the adequacy of existing services of motor common carriers and rail carriers. (3) Even if legislative history is consulted it does not support the District Court's conclusion.

The "legislative history" on which the District Court relied is the following. The 1957 amendment as introduced and as recommended by the Interstate Commerce Commission would have made issuance of a permit dependent upon a finding "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." Contract carriers, some shippers, and others objected to this provision and in the course of passage it was stricken and the five criteria substituted for it. The Commission, motor common carriers, and rail carriers agreed to this change. The Court held that there was no difference between the deleted willingness and ability test and the adequacy of existing service test which the Commission applied.

The criterion here in question, "the effect which denying the permit would have upon the . . . shipper," (or user of service) has always been a basic and central test to be applied in considering an application for entry into a regulated field of business. And the prime standard for determining that test has always been whether existing service is adequate. The criterion of the statute and adequacy of existing service are inseparable concepts. *Schaffer Transportation Co. v. United States*, 355 U. S. 83, 90 (1957); *American Trucking Associations v. United States*, 364 U. S. 1, 13, 14-15 (1960). Many other cases decided by this Court during the past 35 years have so held.

The criterion of the statute is thus a term of art which includes as part of its fixed meaning the question of the adequacy of existing service. In such a case the fixed meaning of the term of art prevails and legislative history may not be consulted for the purpose of finding a different meaning. *Morrisette v. United States*, 342 U. S. 246, 263 (1952); *Packard Motor Co. v. National Labor Relations Board*, 330 U. S. 485, 492 (1947); and other cases.

The foregoing rests on the argumentative assumption that the District Court was correct in holding that the five criteria established new and exclusive standards. However, it is clear that the Court erred in so holding. The five criteria are no more than aids in the determination of the pre-existing standards comprised within the phrase of § 209(b), "consistent with the public interest and the national transportation policy." Enactment of the five criteria did not wipe the slate clean of all pre-1957 standards for the determination of applications under § 209(b) that had been developed by 20 years of administrative and judicial construction. *American Trucking Associations v. United States*, *supra*, 364 U. S. 1. Among the oldest of those standards, and one followed with absolute consistency, is that an application for contract carrier authority will be denied where existing service of motor common carriers and railroads is adequate. This principle clearly still survives if for no other reason than that it is wholly harmonious with the five criteria. There is nothing in the text of the statute that lays any ground for the claim that this long established rule was destroyed by enactment of the five criteria.

But even if legislative history is consulted it does not support the Court's conclusion; instead it is evidence of the Court's error. There is positive evidence that the Senate and House Committees on Interstate and Foreign Commerce who dealt with the 1957 amendment to § 209(b) were aware of the use of the adequacy of existing service test in denying contract carrier applications and of its importance and necessity in the regulation of all classes of carriers. This evidence shows that these Committees did not intend to do away with this test by the 1957 amendment.

During the few weeks while the Committees were considering the amendment to § 209(b) they were simultane-

ously formulating an amendment to the Freight Forwarder Act, 49 U. S. C. §§ 1001 *et seq.*, that would make the adequacy of existing service test a standard to govern the issuance of freight forwarder permits under that act. Their reports recommending that amendment for passage recited that the Commission can deny a contract carrier application on the ground of adequacy of existing service, that this practice is necessary in the regulation of all carriers, and that it ought to be extended to freight forwarders. S. Rep. 542, H. Rep. 880., 85th Cong. 1st Sess. The freight forwarder amendment was passed. Nowhere in the history of the amendment to § 209(b) is any intent manifested to do away with the adequacy of existing service test. It is inadmissible that the Committees who extended the test to freight forwarders so clearly and in emulation of § 209(b) intended to withdraw the test from § 209(b), in the absence of language specifically saying so.

## II

The Commission found that the service proposed can be performed adequately by existing motor common carriers and rail carriers and that denial of the application would not adversely affect the supporting shippers. These findings are in response to two criteria of the 1957 amendment, "the nature of the service proposed" and "the effect which denying the permit would have upon the . . . shipper." The evidence fully supports these findings; they are clearly within the administrative discretion conferred upon the Commission by § 209(b); and the District Court erred in setting them aside.

Steele Canning Company, the principal supporting shipper, had been transporting 80 per cent of the canned goods it sold in its own private trucks. The goods so carried

included Steele's canned goods and canned goods purchased by Steele from Cain Canning Company and Keystone Packing Company, 85 per cent of Cain's output and 75 per cent of Keystone's. A strike of Steele's drivers due to Steele's failure to enter into a contract with them severely curtailed this private carriage, and caused Steele to ask Reddish to file his application for contract carrier authority.

At the time of the strike the three supporting shippers had no knowledge of the services available in most of their sales territory from the protesting motor common carriers, due to the fact that they had been relying upon Steele's private carriage for transportation of most of their output. The goods carried by Steele consisted of orders ranging from 3,000 to 10,000 pounds, and the supporting shippers expressed the opinion that private carriage or Reddish's proposed service was necessary to give adequate service to customers.

The protesting motor common carriers introduced extensive evidence of their authorities and facilities and set forth their ability and willingness to perform the services required by the supporting shippers. The protesting railroads introduced similar evidence. Because of the manifest lack of knowledge of the supporting shippers as to existing services and the showing made by the protesting carriers as to their ability to give adequate service, the Commission's findings as to adequacy of existing service are correct and the District Court erred in setting them aside. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-536 (1946).

The Commission found, in response to another criterion of the 1957 amendment, that granting the permit would have an adverse effect upon the protesting carriers. The

District Court set this aside on the ground that the supporting shippers had testified that if the application was denied they would not ship by the protesting carriers but would use private carriage instead. The Court erred. *American Trucking Associations v. United States*, *supra*, 364 U.S. 1, 18.

The District Court set aside the Commission's finding that the comparative level of proposed and existing motor carrier rates is not a factor to be considered in this case in determining adequacy of existing service. The Court said that rate comparisons are not always material, but held that they are here. In the first place, there is no evidence as to the rates of Reddish or of the motor common carriers applicable in most of the involved territory. Nor is there any evidence of the ability of Reddish to operate at any particular rate level; there must be proof of ability in this regard to support any rate comparisons.

Motor common and contract carriers belong to the same mode of transportation within the meaning of *Schaffer Transportation Co. v. United States*, *supra*, 355 U.S. 83. In *Schaffer* the Court apparently recognized the validity of the Commission's longstanding principle that rate comparisons are not material when one motor carrier seeks to invade the territory of another. This principle has governed for many years where a contract carrier applies for territory adequately served, as here, by motor common carriers.



## ARGUMENT

### I.

**SECTION 209(b) OF THE INTERSTATE COMMERCE ACT AS AMENDED IN 1957 AUTHORIZES THE COMMISSION TO DENY A CONTRACT CARRIER APPLICATION ON THE GROUND THAT THE EXISTING TRANSPORTATION SERVICE IS ADEQUATE.**

A.—THE 1957 AMENDMENT TO § 209(b) SO CLEARLY AUTHORIZES THE COMMISSION TO BASE A DENIAL ON ADEQUACY OF EXISTING SERVICE THAT RESORT TO LEGISLATIVE HISTORY FOR CONSTRUCTION IS NOT PERMISSIBLE.

The Commission found upon ample evidence that the existing transportation service is adequate to meet the shippers' requirements, and this was a principal ground for denial of the application (R. 395; 81 M.C.C. at 41-42). The District Court held that the 1957 amendment to § 209(b), when construed in the light of its legislative history, forbids denial on this ground (R. 406; 188 F. Supp. at 165).

The provisions of § 209(b) here relevant are set out below. The numbers in brackets are not in the text but are inserted for convenience of reference and because the District Court and the Commission refer by number to what are called the five criteria added to § 209(b) by the 1957 amendment. Matter added by the amendment is in italics. The pertinent standards for grant of an application are:

"... that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public*

*interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers and [4] the effect which denying the permit would have upon the applicant and or its shipper [5] and the changing character of that shipper's requirements. . . ."*

Construing these provisions the Commission said (R. 394; 81 M.C.U. at 41):

"Section 209(b) also requires us to consider the effect of a denial on applicant and its supporting shipper. . . . Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements."

The District Court held that denial on that ground was forbidden by the 1957 amendment to § 209(b), saying in part (R. 406; 188 F. Supp. at 165):

"Further, the 'adequacy of existing service' test as applied by the Commission in this case in its determination of the effect upon supporting shippers of a denial of the permit is a test proscribed by the legislative history of the Interstate Commerce Act."

By "legislative history" the Court meant the following. The 1957 amendment originally would have made issuance of a permit dependent upon a finding "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." This was stricken in the course of enactment and the five criteria substituted. On this the Court said (R. 407; 188 F. Supp. at 165-166):

"Our study of the legislative history of this Act convinces us that the deletion of the willingness and ability test was at the specific protest of the contract carriers,

some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law 85-163, 71 Stat. 411). See, *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959).

"We do not believe that there is any difference between the 'willingness and ability' test deleted by Congress from the bill proposed by the Commission and the 'adequacy of service' test which the Commission said it applied in this case—a separate test, it maintains, from the one deleted. . . ."

In holding that the adequacy of existing service test was "proscribed" by the legislative history of the 1957 amendment the Court erred in two particulars. Section 209(b) as amended authorizes the adequacy of existing service test in language of such plain and well settled meaning that resort to legislative history is not permissible. But even if the legislative history is consulted it does not support the Court's conclusion.

The Court held that the five criteria specified in the 1957 amendment provided new and exclusive standards for determination of contract carrier applications and thus forbade the use of other standards, theretofore employed by the Commission, which had been established by twenty years of administrative and judicial construction (R. 409; 188 F. Supp. at 166-167). This is error. *American Trucking Associations v. United States*, 364 U.S. 1, 6, 7, 9, 13, 15 (1960). We will discuss this point more fully later.

But even if the Court were right on this point it does not follow that the Court's ultimate conclusion would be correct. For without anything more the words of the 1957 amendment that the Commission

“ . . . shall consider . . . the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper . . . ”

are apt words of art which authorize denial based on adequacy of existing service. The quoted phrase of the statute and “adequacy of existing service” are inseparable concepts.

The criterion of § 209(b), “the effect which denying the permit would have upon the . . . shipper” (user of the service) has long been a central and basic test to be resolved where entry into a regulated business requires government authorization. And administrative agencies and this Court have always held that resolution of this test requires determination whether existing service is adequate.

Indeed, the effect upon the shipper of denying the permit can be assayed in no other fashion than by considering the adequacy of existing service. Thus in *Schaffer Transportation Co. v. United States*, 355 U.S. 83 (1957), when dealing with the precise issue of the effect of denial of proposed authority upon shippers, the Court said (p. 90):

“ . . . ‘relative or comparative adequacy’ of the existing service is the significant consideration when the interests of competition are being reconciled with the policy of maintaining a sound transportation system.”

For this reason this Court and the administrative agencies have always considered that “the effect which denying the permit would have upon the . . . shipper” and “ade-

quacy of existing service" express inseparable concepts. This principle was applied in a proceeding under § 209(b) as amended in 1957 in *American Trucking Associations v. United States*, *supra*, 364 U.S. 1. There it was urged in defense of an order granting contract carrier authority to a rail subsidiary that the Commission had found justifying "special circumstances" in the record. As to this the Court said (p. 13):

"Appellees urge that nonetheless there were 'special circumstances' within the meaning of *American Trucking Associations*. Appellees point to various findings of fact by the Commission, such as the need of General Motors for a service of the type here involved, Pacific Motor's experience and qualifications . . . The difficulty with appellees' argument is that the Commission did not find that considerations of this nature constituted 'special circumstances' under the *American Trucking Associations* rule, but rather viewed them simply as supporting the basic determinations which it was required to make under § 209(b) in order to issue a contract carrier permit to *any* applicant." (Emphasis is in original text).

Note 9 sets out part of § 209(b) with the 1957 amendment in italics. Then in further comment on the Commission's findings the Court said (pp. 14-15):

"There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor."

The "need of General Motors for a service of the type here involved" and "Pacific Motor's experience and qualifications" and the question whether "independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor" are principal ingredients of the adequacy of existing service test. Thus the Court in that case, in considering § 209(b) as amended in 1957, re-

ferred to the adequacy of existing service test as one of the "basic determinations which [the Commission] was required to make under § 209(b) in order to issue a contract carrier permit to *any* applicant."

In other cases over the past 35 years the Court has uniformly held that probable effect upon the shipper of denying proposed carrier authority and adequacy of existing service are inseparable concepts.<sup>1</sup>

This principle applies not only in permit and certificate cases under §§ 209(b) and 207(a), but also in proceedings under § 5(2) where the proposed unification of two carriers would create a new service competitive with existing carriers. In § 5(2) cases the test is consistency with the public interest. The rule was stated in *Shein v. United States*, 102 F. Supp. 320, 326 (N.J. 1951), affirmed 343 U.S. 944:

"We, therefore, conclude that the Commission applied the right rule of law and had substantial evidence to support its ruling; that there would be a radical change in the pattern of the operations; that there would be a probable adverse effect which this would have on competing carriers; *that there was a lack of evidence to show that the transaction would supply any need of the public not now being adequately met by other carriers*; and therefore concluding that the granting of the transfer would not be consistent with the public interest." (Emphasis added).

Note that the District Court there linked the "need of the public" (the effect of denial upon shippers) to adequacy

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<sup>1</sup>*American Trucking Assns. v. United States*, 355 U.S. 141, 153 (1957); *United States v. Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 240-241 (1945); *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 68-69 (1945); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 392 (1932); *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 277-278 (1926).

of existing service. This concept has been uniformly followed by district courts in § 5(2) cases and affirmed by this Court.<sup>2</sup>

Under the Federal Communications Act, 47 U.S.C. § § 151 *et seq.*, economic injury to an existing radio station is not a ground for denying a competitive application. Nevertheless, the Communications Commission, in determining the effect upon the public (the "shipper") of granting or denying a competitive application, must take into account the adequacy of the existing service with the view to preventing the impairment of existing adequate service that could result from the destructive competition of a new licensee. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475-476 (1940).

It is clear that the phrase of § 209(b), "the effect which denying the permit would have upon the . . . shipper," has always been inseparably linked to "adequacy of existing service," so that resolution of the first phrase is wholly dependent upon determination of the second. The first phrase would lack any consequential meaning unless it included consideration of the second.

Thus when Congress used the phrase "the effect which denying the permit would have upon the . . . shipper" it employed a term of art which included as part of its fixed meaning "consideration of the adequacy of existing service." In such a case the fixed meaning of the term of art prevails and legislative history may not be consulted for the purpose of finding a different meaning. In *Morrisette*

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<sup>2</sup>*Houff Transfer v. United States*, 105 F. Supp. 851, 855 (W. D. Va. 1952); *Herrin Transp. Co. v. United States*, 108 F. Supp. 89, 94-95 (E. D. La. 1952), affirmed 344 U.S. 925; *Ratner v. United States*, 162 F. Supp. 518, 519 (S. D. Ill. 1957), affirmed 356 U.S. 368.



v. *United States*, 342 U.S. 246, 263 (1952), the Court said in holding resort to legislative history not permissible:

“And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”

In *Case v. Los Angeles Lumber Products Company, Ltd.*, 308 U.S. 106, 115 (1939), the Court said:

“The words ‘fair and equitable’ as used in § 77B(f) are words of art which prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, *Duparquet Huot & M. Co. v. Evans*, 297 U.S. 216, we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. *Keck v. United States*, 172 US 434, 446.”

In *Packard Motor Co. v. National Labor Relations Board*, 330 U. S. 485 (1947), the question was whether the word “employee” as used in the National Labor Relations Act includes foremen. Opponents of such inclusion pointed to statements of members of Congress to the effect that the Act would not cover foremen. Nevertheless, the Court held that prior to passage of the Act the word “employee” had always included foremen in its meaning, and that resort to legislative history could not be had to reach a contrary result. The Court said (p. 492):

“We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen

was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

Precisely to the same effect are *Gemsco v. Walling*, 324 U. S. 244, 260 (1945) and *Ex Parte Collett*, 337 U. S. 55, 61 (1949).

This rule applies even in the face of inferences, which are wholly lacking here, that Congress may have used the term mistakenly or inadvertently. Thus in *Unexcelled Chemical Corp. v. United States*, 345 U. S. 59, 64 (1953), the Court said:

"Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings subject matter into a statute, its word is final . . ."

Congress plainly used language in the amendment which called for consideration of adequacy of existing service, and its word is final and not open to construction based on legislative history.

Nevertheless, if legislative history is consulted it does not support the District Court's conclusion. We discuss this point in sub-part C, *infra*, p. 32.

**B.—THE FIVE CRITERIA OF THE 1957 AMENDMENT TO § 209(b) DID NOT ESTABLISH EXCLUSIVE STANDARDS FOR THE DISPOSITION OF APPLICATIONS AND DID NOT IMPAIR THE PRE-1957 PRINCIPLE THAT DENIAL MAY BE BASED ON ADEQUACY OF EXISTING SERVICE.**

This sub-part B does not overlap the position taken in our

preceding sub-part A. There we pointed out that even assuming the correctness of the Court's holding that the five criteria of the amendment established exclusive standards, an application could, nevertheless, be denied on the ground of adequacy of existing service because that phrase is the principal and indestructible element of the 4th criterion, "the effect which denying the permit would have upon the . . . shipper." Here we submit that the five criteria did not establish exclusive standards and thus did not impair the pre-1957 principle that denial may be based on adequacy of existing service.

On this question the District Court said of the amendment (R. 409; 188 F. Supp. at 167), quoting as authority *J-T Transport v. United States*, 185 F. Supp. 838, 849 (1960):

"It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application."

The Court erred in that conclusion. *American Trucking Associations v. United States*, *supra*, 364 U. S. 1. There it was held that the specification of the five criteria in the 1957 amendment did not preclude the use of standards for the determination of railroad applications for motor carrier authority that had been developed by twenty years of administrative and judicial construction of §§ 5(2)(b) and 207 and which had been judicially transplanted in § 209. The Court so held despite the total lack of identification or

resemblance textually between the five criteria of the amendment and the decisive 20 years-old principles relied upon in *American Trucking*. Thus the Court clearly held that the enactment of the five criteria did not wipe the slate clean of all pre-1957 standards for determination of an application under § 209(b). And as we have pointed out above, the Court recognized in *American Trucking* the propriety of the adequacy of service test under § 209(b) as amended, either as a pre-1957 standard or as an element of the 4th criterion of the amendment or perhaps as a combination of both factors.

Before 1957 the statutory test for disposition of § 209(b) applications was consistency "with the public interest and the national transportation policy," and the prime standard for determination was adequacy of existing service. A concise statement of this principle appears in *Wilson v. United States*, 114 F. Supp. 814, 822 (W. D. Mo. 1953):

"In light of the foregoing, we believe there was substantial evidence before the Commission from which it could find and conclude that the supporting shipper has available motor carrier service for the transportation of 'frozen eggs and frozen poultry' to all points to which service is desired so as to sustain the conclusion of the Commission that 'the proposed operation (would not) be consistent with the public interest and the national transportation policy.'"

The principle so expressed has governed the administration of § 209(b) ever since its enactment. In *C. & D. Oil Company Contract Carrier Application*, 1 M.C.C. 329, 331 (1936), where the application was opposed by motor common carriers and railroads the Commission said:

"This case presents squarely for our consideration the question of whether the desire of a shipper to engage the services of a particular person as a contract

carrier, standing alone, constitutes a sufficient ground for the granting to that person of the right to enter the trucking field, even though the traffic proposed to be transported is now handled satisfactorily by existing trucking facilities. In our opinion, the granting of the permit sought on this ground alone would not be consistent with the public interest or with the policy declared in section 202(a) of the act."

And in *Overland Freight Lines Extension*, 69 M.C.C. 143, 148 (1956), where a contract carrier application was similarly opposed, the Commission said:

"From these and other facts of record, we cannot reasonably conclude that the services available to the interested shipper have been inadequate, or that, despite those available services, there is, or will be a need for a transportation service which applicant can provide but which other carriers cannot or will not provide."

There have been numerous denials of contract carrier authority prior to 1957, solely because of adequacy of existing common carrier service.<sup>3</sup>

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<sup>3</sup> For example: *Carr*, 2 M.C.C. 263, 268-269 (1937); *Myers*, 3 M.C.C. 273, 275 (1937); *Kuczinski*, 4 M.C.C. 45, 46 (1937); *Castranova*, 6 M.C.C. 769, 770 (1938); *Eastern Shore*, 7 M.C.C. 173, 176 (1938); *Waldorf*, 8 M.C.C. 543, 545 (1938); *Stegall*, 9 M.C.C. 475, 476 (1938); *D'Agata*, 10 M.C.C. 149, 150 (1938); *Scott*, 11 M.C.C. 227, 228 (1939); *Hoy*, 14 M.C.C. 797, 799-800 (1939); *Hypes*, 16 M.C.C. 543, 544-545 (1939); *Footte*, 18 M.C.C. 161, 162 (1939); *Burwen*, 19 M.C.C. 644, 645-646 (1939); *Daum*, 22 M.C.C. 366, 367 (1940); *Brown*, 24 M.C.C. 315, 317 (1940); *Jorgensen*, 30 M.C.C. 459, 460 (1941); *Worm*, 32 M.C.C. 641, 644 (1942); *Hibbard*, 47 M.C.C. 311, 314 (1947); *Kilmer*, 53 M.C.C. 561, 570-571 (1951), 61 M.C.C. 147, 149 (1952); *Vidas*, 61 M.C.C. 439, 443 (1952); *Benson*, 61 M.C.C. 128, 130 (1952); *Guex*, 67 M.C.C. 224, 225 (1956); *Millard*, 68 M.C.C. 114, 116 (1956).

It is beyond question that for twenty years prior to 1957 the Commission followed the consistent principle of denying contract carrier applications where existing common carrier service was adequate. Nothing in the terms of the 1957 amendment would support a contention that the amendment tampered with that principle, and, indeed, the District Court does not base its holding in any respect upon the text of the amendment. It could not do so since, as we show in sub-part A, *supra*, the phrase of the amendment, "the effect which denying the permit would have upon the . . . shipper" and "adequacy of existing service" express inseparable concepts. The actual language of the amendment confirmed and continued the Commission's principle.

The amendment left unimpaired principles that had been developed by administrative and judicial construction before 1957. *American Trucking Associations v. United States*, *supra*, 364 U. S. 1. Because of the inseparableness of the effect of denial upon the shipper and adequacy of existing service, the adequacy test is assuredly one of the surviving principles.

In view of these considerations it was extraordinary and inadmissible for the Court to consult legislative history. However, that history not only does not support the District Court but instead affirmatively refutes its conclusion.

**C.—THE LEGISLATIVE HISTORY OF THE 1957 AMENDMENT DOES NOT SUPPORT THE DISTRICT COURT'S CONCLUSION THAT THE FIVE CRITERIA OF § 209(b) BAR USE OF THE ADEQUACY OF EXISTING SERVICE TEST.**

It is our position, for the reasons heretofore stated, that resort to legislative history is not permissible. But even if that history is consulted it does not support the District



Court's conclusion that the five criteria of § 209(b) bar use of the adequacy of existing service test; the history refutes that conclusion.

The amendment to § 203(a)(15) by the 1957 act should first be noted. This section defines contract carrier, and the amendment was occasioned by the decision in *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956), that a contract carrier is free to enter into contracts with an unlimited number of shippers. S. Rep. 703, 85th Cong., 1st Sess., p. 3. The amendment changed the former definition by adding the qualification that a contract carrier operates

“... under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.”

Under the bill as introduced that qualification read:

“... under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.” (S. Rep. 703 p. 2).

The amendment to § 209(b) as originally proposed would have added to the findings required for the issuance of a permit the following:

“... that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.” (S. Rep. 703 p. 3).

The entire original bill appears in the record of the Hearings Before the Senate Committee on Interstate Commerce on S. 1384, May 7, 1957, p. 6.



The amendments originally proposed were offered by the Commission. The contract carriers and other parties objected to them as unnecessarily stringent, and the Commission agreed to substitution of the provisions of the amendment that were enacted. (S. Rep. 703 pp. 6-7).

This is the legislative history upon which the District Court based its judgment that the adequacy of existing service test "is a test proscribed by the legislative history of the Interstate Commerce Act." (R. 406; 188 F. Supp. 165-166).

It is of course true that the deleted provisions would have authorized the Commission to deny the Reddish application. But it does not follow that the Commission lacks the power under the bill as passed to deny on the ground that existing service is adequate. Actually the amended act with the five criteria of § 209(b) confers much broader discretion than the proposed language; and the 4th criterion, the effect upon the shipper of denying the application, is inseparable from the adequacy of existing service test under a consistent line of court and Commission decisions over the past twenty years. The original terms would have required an *automatic* denial if it appeared that common carriers were willing and able to provide the service needed. As passed the Act does not require automatic denial, but it clearly does grant administrative discretion on a more comprehensive scale to deny an application in a proper case where, as here, authorization would adversely affect existing carriers and would not adversely affect shippers because existing service is adequate. The substitution of administrative discretion within the five criteria for the automatic denial originally proposed does not mean that the Commission is powerless to deny an application in a proper case under the specified criteria.

If Congress had intended to abolish the long standing adequacy of existing service test it would have made its intent clear. There is positive evidence that the Senate and House Committees on Interstate and Foreign Commerce that dealt with the 1957 amendment to § 209(b) were aware of the use of this test as the basis for denial of contract carrier authority and of its importance and necessity in the regulation of all classes of carriers. During the few weeks while the Senate and House Committees were considering the amendment to § 209(b) they were simultaneously formulating legislation that would make the adequacy of existing service test a standard to govern the issuance of freight forwarder permits under the Freight Forwarder Act, 49 U. S. C. § § 1001 *et seq.* As passed in 1942 the act forbade denial of a permit on the ground of adequacy of existing service of other freight forwarders. 56 Stat. 291-292; H. Rep. 1172 p. 22, 77th Cong., 1st Sess. In recommending the freight forwarder amendment for passage in 1957 both Committees stated as a reason therefor that the Commission had the power to deny contract carrier applications "on the ground that the existing service is adequate," and that this was a necessary power for the proper regulation of carrier service and ought to be extended to freight forwarders.<sup>1</sup> S. Rep. 542 p. 3, H. Rep. 880 p. 4; 85th Cong., 1st Sess.

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<sup>1</sup>The following sequence of events in the 85th Congress, 1st Session, is significant. On June 27, 1957, the Senate Committee recommended passage of the bill to amend the Freight Forwarder Act, S. Rep. 542, and on July 24, 1957, the same Committee recommended passage of the amendment to § 209(b) in the identical form in which it passed, S. Rep. 703. On July 25, 1957, the House Committee recommended passage of the freight forwarder amendment, H. Rep. 880, and on August 2, 1957, the same Committee recommended enactment of the bill passed by the Senate amending § 209(b), H. Rep. 970. The Senate passed the

In S. Rep. 542, respecting the freight forwarder amendment, the Senate Committee said (p. 3):

"It has long been recognized that in order to maintain sound economic conditions in transportation, and to insure adequate, efficient, and economical service for the public, the Interstate Commerce Commission must have effective control over the number of entrants and extent of service in any given field of transport. . . .

"Under the above-mentioned provisions of the act, the Commission has regularly and frequently denied applications for new or additional operating authority upon the grounds that the service of existing carriers was adequate to meet all reasonable requirements of the shipping public, and that the institution of additional service would result in needless and uneconomic duplication of existing facilities.

"However, because of the provisions of section 410(d), the Commission has felt compelled to grant freight-forwarder permits without regard to these considerations. The Commission's interpretation of the statute was spelled out in *Lifschultz Fast Freight, Extension—West and Midwest* (265 I.C.C. 431 (1948)). The Commission placed great weight on section 410(d), being of the view that the purpose of that section—

*is to assure that freight-forwarder applications shall not be denied as were motor contract carrier applications, on the ground that the existing service is adequate (265 I.C.C. 431, 440).*" (Emphasis added).

The House Committee Report, H. Rep. 880 pp. 3-4, contains similar statements.

The recommended legislation was passed, and it amended § 410(d) of the Freight Forwarder Act, 49 U.S.C. § 1010(d),

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freight forwarder amendment on July 3, 1957, and the contract carrier amendment on August 8, 1957. The House passed both amendments on August 14, 1957. 103 Cong. Rec. 10896, 14034-36, 14774-83, 14784-85.

to permit denial of a permit on the ground of adequacy of existing service of other freight forwarders, with an exception not here material. 71 Stat. 452; S. Rep. 542 pp. 2-3.

The simultaneous histories of the contract carrier and the freight forwarder amendments show explicitly that the Senate and House Committees knew of the long established practice of the Commission to deny contract carrier applications because of adequacy of existing service, that they considered this practice necessary for the proper regulation of carrier service, and that they intended to make it applicable to the Freight Forwarder Act. And nowhere in the history of the amendment to § 209(b) is any intent manifested to do away with that principle in connection with contract carrier applications; instead the intent is plain to retain as to contract carriers the principle that was extended to freight forwarders. It is inadmissible that the Committees who extended the principle to freight forwarders so clearly and in emulation of § 209(b) intended to repeal the principle as to § 209(b) without saying so.

The legislative history does not support the District Court's conclusion; instead it refutes that conclusion. Moreover, summing up the purpose of the bill as finally presented and passed Senate Report No. 703 said in its last paragraph:

"Your committee is of the opinion that the public interest in a sound transportation system, and *particularly in a stable and adequate system of common carriage*, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed." (Emphasis supplied).

When the bill came before the Senate for action Senator Smathers, Chairman of the Surface Transportation Subcommittee of the Committee on Interstate and Foreign Com-

merce, made the following statement explanatory of the five criteria added to § 209(b) :

"This section is also amended by adding a new sentence providing that hereafter the Commission, in passing upon new permits, shall consider the number of shippers to be served, the nature of the service proposed, the effect which granting the permit would have upon protesting carriers and the effect which denying it would have upon the applicant and its shipper. In this, the Committee is proposing to give the Commission more helpful standards than are contained in the present law." (103 Cong. Rec. 14036).

Assuredly, in the light of those statements it cannot be said that Congress intended to diminish any of the Commission's powers in respect to control over entry of applicants into the contract carrier business.

## II

### **THE COMMISSION'S FINDINGS WERE SUPPORTED BY THE EVIDENCE AND WERE REASONABLE AND PROPER AND THE DISTRICT COURT ERRED IN SETTING THEM ASIDE.**

The administrative judgments of the Commission in this case and its evaluations of the various factors are well within the broad confines of power which § 209(b) delegates to the Commission to exercise in the light of its experience and special knowledge. The District Court erred in overturning them.

#### **A.—GENERAL CONSIDERATIONS.**

From 1948 to mid-1958 Steele Packing Company was shipping a large and increasing proportion of its products

in its own private trucks, and by 1958 it was moving about 80 per cent of its output in this way in 29 tractor-trailer combinations (R. 134-135, 157, 207-209). This traffic consisted principally of orders ranging from 3,000 (the minimum) to 10,000 pounds (R. 126). Of the 29 combinations, 13 were owned by Steele and the rest were leased to Steele by various owners (R. 157). Reddish had commenced leasing vehicles to Steele in 1953 with 3 combinations, and by 1958 Reddish was leasing 9 combinations to Steele under one-year leases with provisions for cancellation by either party on 30 days notice (R. 50-52). Reddish maintained the vehicles and supplied gas, oil, and tires, and was paid on a mileage basis; and Steele hired, discharged, and supervised the drivers and carried public liability insurance on the vehicles (R. 50-52).

Early in 1958 Steele and its truck drivers had a labor dispute, and in March in an election supervised by the National Labor Relations Board the drivers voted to have the Teamsters Union as their bargaining agent, pursuant to which the Board so certified the Union (R. 158, 200). A further labor dispute was followed by a strike of the drivers and picketing of the Steele plants; and the strike has continued and Steele and the drivers have not entered into an employment agreement (R. 158-159, 169).

This strike was the moving cause, and the only cause, for the filing of the instant contract carrier application by Reddish; this is perfectly clear (R. 57, 159-161). The filing was made at Steele's suggestion and with Steele's support (R. 57, 160). Under his emergency and temporary contract carrier authority beginning in June, 1958, Reddish has been employing 19 drivers to operate his 9 combinations formerly leased to Steele (R. 52-53, 58). All of these are non union drivers (R. 72).



But the significant fact of the Steele strike and the resulting Reddish application is not the emergence of a device to frustrate the Union's bargaining efforts; far more important is the light these events and their background circumstances cast upon the principal evidentiary issues of the case.

Before 1940 Reddish assisted his father in the operation of the latter's motor common carrier business, performing every kind of job; and after 1940 he worked as a truck driver and mechanic and carrier of exempt commodities in his own 3 trucks until he leased the trucks to Steele in 1953 (R. 49-50). But with all this motor carrier background Reddish had never attempted to obtain motor carrier authority from the Interstate Commerce Commission until the Steele strike motivated Steele to induce him to seek it in this case (R. 44). Moreover, Steele had been performing extensive private carriage for 10 years, and had been leasing vehicles from Reddish for 5 years, but until the strike forced it to do so there is no evidence that Steele had ever entertained any idea of substituting for-hire carriage for its own private operation.

Thus when the strike curtailed Steele's long-standing transportation arrangements Steele was confronted with an emergency unlike any it had ever had, and one extremely distasteful to it. By reason of Steele's intense preoccupation with its private carriage operation and because of the practices it had followed in handling the portion of its outbound traffic that moved by motor common carrier, Steele was at the time of the strike almost wholly without knowledge of the motor common carrier transportation facilities available to move its traffic throughout its sales territory (R. 153-155, 185-188, 192-193, 201, 210-211, 375-380, 391-392). Steele had been turning over to Jones Truck Lines, Inc., of Springdale, a motor common carrier, the



traffic it shipped by motor common carrier, about 20 per cent of its output. When Jones' authorized routes did not reach the destination of the shipment, Steele had left entirely to Jones the arrangements for interline to destination, and Steele did not know nor care to know who the interlining common carriers were (R. 187, 192-93, 210-211). Steele used Jones because Jones' main office was in Springdale, and Steele was not interested in carriers not having an office in Springdale (R. 185, 187, 199).

In the strike emergency Steele turned to Reddish to take over the transportation formerly performed by Steele. Extensive motor common carrier service and rail service were available to Steele's sales territory (R. 270-363, 375-380, 391-392), but having no knowledge of it, and thinking only in terms of its private carriage operation, Steele made no investigation of it and did not try to use it (R. 153-155, 185-188, 192-193, 201, 210-211, 375-380, 391-392). It is obvious that Steele, having leased trucks from Reddish for 5 years for use in its private carriage, simply looked no farther than Reddish when because of the strike Steele had to find a substitute for its private transportation operations. With the habits of 10 years of private carriage Steele wanted to continue as nearly as possible in that course.

It will not do to say that Steele's experience with Jones had kept Steele informed as to the possibilities of motor common carrier transportation. There is no evidence to that effect, and what evidence there is in the record indicates the contrary; Steele was not interested in Jones' interlining problems or operations (R. 187, 192-193, 210-211). Moreover, Jones was neither a protestant nor a witness in this proceeding. There is a compelling presumption that Jones, the recipient of 20 per cent of Steele's traffic, lacked the urge to attempt to induce Steele to abandon its cherished

private carriage, or its substitute therefor in Reddish, in favor of motor common carriage. And of Jones' experience and ability in handling transportation problems the record is silent.

Steele's witness testified to the need of Steele for service on the traffic formerly handled in Steele's private trucks, that the customers receiving the small orders, 3,000 to 10,000 pounds, often work on 10-days supply, that they often specify the day and even the hour of delivery, that this service is necessary to meet competition, that less-truckload common carrier service is too slow (R. 125-128, 133-135). But as the Commission found, this testimony does not prove a need for a new service where, as clearly appears, Steele is wholly unacquainted with most of the motor common carrier services available in Steele's extensive sales territory and has made no substantial attempt to find out what these services can do (R. 153-155, 185-188, 192, 201, 210-211, 375-380, 391-392), and where, as here, existing carriers have shown that they can give Steele adequate service (R. 270-363, 375-380, 391-393).

Cain and Keystone before the Steele strike sold most of their output, 85 and 75 percent respectively, to Steele who furnished the transportation for its purchases (R. 214, 238-239). They are obviously looking to Steele and following Steele's leadership to obtain transportation to replace that curtailed by the strike. Cain did not arrange for any transportation before the strike (R. 215) and has no knowledge of transportation services available in the territory it wants to serve (R. 224-226, 228, 229, 231). Keystone shipped 20 percent of its output by motor common carrier (R. 243), but has no knowledge of transportation services available in most of the territory (R. 251-255, 258, 261, 266-267). As in Steele's case, they do not prove need for Reddish's proposed service where they have made no attempt to find out

what existing carriers can do and where such carriers have shown that they can furnish adequate service (R. 270-363, 375-380, 391-393).

The protesting carriers can furnish adequate service to the supporting shippers. Four of the protesting motor carriers serve the origin points and can serve many of the destination states directly (R. 274-276, 289-291, 315-316, 322-325). By interline with other protesting motor carriers they can provide service to many other states (R. 375-376, 275, 279, 289, 302-305, 309-311, 316, 324-325, 337-341, 349-352). The motor carriers have equipment constantly available, operate daily schedules, and are performing satisfactorily for other shippers the type of service that the supporting shippers want including split-load, multiple pick-up, and stop-off in transit (R. 277-279, 290-292, 303-305, 310-311, 316-317, 322, 325, 340, 354). They can likewise furnish adequate service on the inbound freight (R. 275-276, 291, 304, 311, 317, 326, 340-341, 354). The protesting railroads on their own lines and by interline with other railroads operate extensively throughout the involved territory and can furnish outbound and inbound service (R. 144, 207, 243, 251, 330-331, 335-336, 360, 362-363, 880-381, 392).

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Based on this evidence and in conformity with § 209(b) the Commission made the findings upon which it denied the application. It is clear that these findings are supported by the evidence and that they are within the scope of the administrative power delegated to the Commission. The District Court erred in setting them aside.

**B.—THE FINDING THAT THE SERVICE PROPOSED CAN BE PERFORMED ADEQUATELY BY EXISTING MOTOR COMMON CARRIERS AND RAIL CARRIERS.**

In considering the second criterion of § 209(b), "the na-

ture of the service proposed," the Commission found (R. 393, 81 M.C.C. at 41):

"Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stopoff in transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted."

**C.—THE FINDING THAT DENIAL OF THE APPLICATION WOULD NOT ADVERSELY AFFECT THE SUPPORTING SHIPPERS.**

On this the Commission found (R. 394, 81 M.C.C. at 41-42):

"Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially

those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

In respect to the two foregoing findings the District Court said (R. 405; 188 F. Supp. at 165):

"Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application."

In this conclusion the Court substituted its own judgment for that of the Commission in the area of administrative discretion bestowed by § 209(b) exclusively upon the Commission. Applicable here is the familiar principle expressed in *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-536 (1946):

"We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '... the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the

business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

**D.—THE FINDING THAT A GRANT OF AUTHORITY WOULD ADVERSELY AFFECT EXISTING CARRIERS.**

The Commission found (R. 394, 81 M.C.C. at 41):

"It is clear that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. See *J-T Transport case, supra.*" [79 M.C.C. 695]

The District Court said (R. 410, 188 F. Supp. at 167):

"In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

"Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traf-



fic but would not handle it if the permit were denied."

The statement that the protesting carriers would not handle the traffic if the permit were denied refers to the testimony of shippers that if the Reddish application is denied they would return to private truck operation for the traffic in question (R. 390).

Assertions of this kind by shippers are not ground for granting an application nor for assaying the effect of a denial upon protesting carriers. If it were a shipper could dictate to the Commission. On this point the Court said in *American Trucking Associations v. United States*, *supra*, 364 U.S. 1, 18:

"... And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. ..."

**E.—THE FINDING THAT THE COMPARATIVE LEVEL OF PROPOSED AND EXISTING MOTOR CARRIER RATES IS NOT A FACTOR TO BE CONSIDERED IN THIS CASE IN DETERMINING ADEQUACY OF EXISTING SERVICE.**

The Commission said (R. 395, 81 M.C.C. at 42):

"It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act."



The District Court said (R. 409; 188 F. Supp. at 167):

"Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. Congress has declared one of the goals of our national transportation policy is to promote 'economical' service.

"We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded."

That holding is mined heavily with charges for its own destruction. For nowhere in the record is there any showing that "the lower rates result from economies and advantages inherent in" Reddish's operations. There is a compelling inference that Reddish and the supporting shippers have achieved some economies by Steele's failure to make a contract with the striking Teamsters Union, certified as bargaining agent by the National Labor Relations Board, and the consequent operation of Reddish's trucks by non-union drivers (R. 158, 169, 72). But it seems doubtful whether this is the type of economy that is consistent with the District Court's statement. Moreover, there is no evidence, as distinguished from speculation, that Reddish's

rates would be lower than the rates that could be provided by existing carriers whose services the shippers are not even interested in investigating.

On this sparse record the District Court erred fundamentally in getting into the rates question at all. In *Texas & Pacific Ry. Co. v. Gulf, Colorado, & Santa Fe Ry. Co.*, *supra*, 270 U.S. 266, 278, the Court said:

“For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.”

In the District Court Reddish and other parties argued that contract carriage is a mode of transportation different from the common carrier mode. The Court mentions this point but does not decide it (R. 403). Irrespective of that question, Reddish has not shown that he can take advantage of the principle stated in *Schaffer Transportation Co. v. United States*, *supra*, 355 U.S. 83, 91:

“The *ability* of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of ‘inherent advantage’ that the congressional policy requires the Commission to recognize.” (Emphasis added).

If there is a key word in that declaration, it is “*ability*.” The mere proffer of a lower rate is not enough. There must be ability to carry on operations, that is, to pay the way, to live with it. The record is wholly devoid of any such showing by Reddish.

While not decided by the District Court, the question whether contract carriage is a separate mode may here be briefly considered. The expression in *Schaffer* was based on the national transportation policy which refers to “all

modes of transportation subject to the provisions of this Act." The Act is divided into four parts regulating rail, motor, and water carriers, and freight forwarders. The policy states the purpose of "preserving a national transportation system by water, highway, and rail, as well as other means." In § 5a(4), 49 U.S.C. § 5b(4), carriers are classified separately for the purpose of that paragraph as rail, pipe-line, motor, water, and freight forwarder. All of the statutory indicators show that these are modes of the policy, and that one of these explicitly identified modes is not divisible into two or more modes. Contract carriers regulated under Part II of the Act belong to the same mode as the common carriers subject to that part.

In *Schaffer, supra*, the Court apparently approved the Commission's long standing practice of refusing to consider rates where motor carrier applicants seek to serve territory already served by other motor carriers, saying (355 U.S. at 91-92):

"... The Commission asserts that it has always considered rates irrelevant in certification proceedings under § 207(a), yet, with but one exception, it relies on administrative decisions involving applications by a carrier to provide service to an area already served by the same mode of transportation.<sup>7</sup> Those decisions are entirely different from the situation presented here, where a motor carrier seeks to compete for traffic now handled exclusively by rail service. In these circumstances a rate benefit attributable to differences between the two modes of transportation is an 'inherent advantage' of the competing type of carrier and cannot be ignored by the Commission."

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<sup>7</sup>Omaha & C.B.R. & Bridge Co. Common Carrier Application, 52 MCC 207, 234, 235; Pomprowitz Extension—Packing House Products, 51 MCC 343, 347, 348; Black Extension of Operations—Prefabricated

A week after *Schaffer* was decided the Court affirmed *per curiam* a district court decision sustaining the Commission's refusal to consider a rate question in a § 207(a) proceeding where the application was opposed by motor carriers. *Railway Express Agency, Inc. v. United States*, 153 F. Supp. 738 (1957), affirmed 355 U.S. 270.

This principle applies equally where a contract carrier seeks authority in an area served by motor common carriers. *Dixon and Koster Application*, 32 M.C.C. 1, 4 (1942); *Southland Produce Co. Application*, 81 M.C.C. 625, 628-629 (1959); *Motorway Corporation Extension*, 73 M.C.C. 731, 734 (1957), where the Commission said:

"If a shipper desires contract carrier service simply as a way to obtain rates lower than the prevailing common carrier rates, and not because of material deficiencies in the existing common carrier service, it is clear that a permit should not be granted."

The Commission found upon ample evidence that the existing transportation services are adequate to serve the shippers' needs. That finding is clearly well inside the administrative province delegated to the Commission. In this situation the question of the comparative level of rates is not relevant. But even if it were relevant the record is lacking in any proof that Reddish's rates would actually be the lower rates. And, perhaps more important, there is no evidence of Reddish's ability to operate under lower rates.

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Houses, 48 MCC 695, 708, 709; Johnson Common Carrier Application, 18 MCC 194, 195, 196; Wellspeak Common Carrier Application, 1 MCC 712, 714.

"In the one exception, Youngblood Extension of Operations—Canton, N.C., 8 MCC 193, the motor carrier's application was opposed by other motor carriers."

**CONCLUSION**

For all of the foregoing reasons the judgment of the District Court should be reversed and the cause remanded to the District Court with directions to dismiss plaintiff's complaint.

Respectfully submitted,

AMOS M. MATHEWS

JAMES W. NISBET

ED WHITE

280 Union Station Building


Chicago 6, Illinois

E. L. RYAN, JR.

La Salle Street Station

Chicago 5, Illinois

*Attorneys for Appellants*



## APPENDIX

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., S. 1384, provides as follows (deletions by the amendment shown in brackets, additions made by the amendment in italics):

The term "contract carrier by motor vehicle" means any person which, [under individual contracts or agreements], engages in [the] transportation *by motor vehicle of passengers or property in interstate or foreign commerce, for compensation* (other than transportation referred to in paragraph (14) and the exception therein), [by motor vehicle of passengers or property in interstate or foreign commerce *for compensation*] *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*

Section 209(b) of that Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-12, Public Law 85-163, 85th Cong., S., 1384, provides as follows (deletions and additions made by the amendment are shown in the same manner as shown for Section 203(a)(15)):

Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and



able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, *including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as [are] may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the [operations] operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): Provided, [however,] That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute [or add] similar contracts within the scope of [the] such per-*

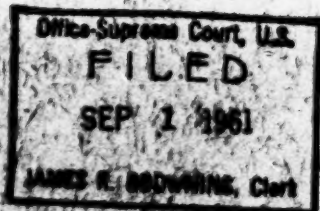


*mit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso. [or to add to his or her equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.]*

**National Transportation Policy**  
(49 U.S.C. preceding § 1)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (September 18, 1940, 54 Stat. 899).

**LIBRARY**  
**SUPREME COURT, U. S.**



No. 53

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1961**

**INTERNATIONAL COMMERCE COMMISSION, APPELLANT**

**ELVIS E. HUNTER, ET AL., APPEELES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF ARIZONA, PORT ANNE DIVISION**

**BRIEF FOR THE INTERNATIONAL COMMERCE COMMISSION**

**ROBERT W. CHENNEY**  
General Counsel  
**R. FRANKLIN TAYLOR, Jr.**  
Assistant General Counsel  
**ARTHUR E. CHASE**  
Assistant General Counsel  
International Commerce Commission  
Washington 25, D.C.

**SEPTEMBER, 1961**

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1961

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No. 53

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ELVIN L. REDDISH, ET AL., APPELLEES

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION*

---

**BRIEF FOR THE INTERSTATE COMMERCE COMMISSION**

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## **OPINIONS BELOW**

The opinion of the statutory three-judge District Court (R. 398) is reported at 188 F. Supp. 160. The report of the Interstate Commerce Commission (R. 385) is published at 81 M.C.C. 35.

## **JURISDICTION**

The final judgment and order of the District Court was entered on October 19, 1960 (R. 411). Notice of appeal was filed on December 16, 1960. This Court noted probable jurisdiction on April 17, 1961, 365 U.S. 879 (R. 421) and consolidated this case with Nos. 49 and 54, which are separate appeals from the same judgment by other parties to the district court action.



Jurisdiction of this Court to review the final judgment and order of the District Court is conferred by 28 U.S.C. 1253 and 2101(b).

#### QUESTIONS PRESENTED

Some of the questions presented in this appeal are identical with those raised in *Interstate Commerce Commission v. J-T Transport Co., Inc., et al.*, No. 17. This case likewise involves the denial of a contract carrier permit under the provisions of Section 209(b) of the Interstate Commerce Act, as amended in 1957.

The questions common to both appeals are:

1. Whether, in passing upon an application for a contract carrier permit, the Interstate Commerce Commission is precluded by the 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act from giving any consideration to an affirmative showing by protesting common carriers that they are authorized, able and willing to provide a service adequate to fulfill the transportation requirements of the shippers supporting the application.

2. Whether, in applying the statutory standard of consistency with the public interest and the National Transportation Policy and the criterion of "the effect which granting the permit would have upon the services of the protesting carriers," the Commission erred in concluding that granting the permit would be inimical to the preservation of sound economic conditions in the transportation industry and would adversely affect the services of the protesting carriers by withdrawing potential traffic which the protesting carriers can handle adequately and should be

given the opportunity to handle before additional authority is granted.

In addition to these common questions, this appeal presents the following additional questions:

3. Whether the Commission's findings as to the effect of a denial upon the supporting shipper were adequate and supported by substantial evidence, and whether the district court erred as a matter of law by substituting its own findings on this issue.

4. Whether, in determining "the effect which denying the permit would have upon the \* \* \* shipper," as required by Section 209(b), the Commission must give consideration to the proposed lower rates of an applicant for a contract carrier permit.

#### **STATUTES INVOLVED**

The National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901 and 1001); section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong.); and section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-412, Public Law 85-163, 85th Cong.) are set forth in the Appendix.

#### **STATEMENT**

This is a direct appeal from a final judgment of a three-judge District Court for the Western District of Arkansas, Fort Smith Division, which set aside an order of the Commission denying a contract carrier permit to E. L. Reddish (Reddish).

*The Administrative Proceedings:* Appellee Reddish filed an application under Section 209(b) of the Interstate Commerce Act, as amended, (Act), 49 U.S.C. 309(b), for a contract carrier permit to transport canned goods for three shippers<sup>1</sup> from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to numerous points in 33 States, and of materials and supplies used in the manufacture of canned goods from 30 of these States to the 4 named points in Arkansas and Oklahoma (R. 23-36, 386-387).<sup>2</sup> A number of rail and motor carriers opposed the application and presented evidence of their operating authorities and operations, their equipment suitable for the transportation of canned goods and their desire to provide the service required by the shippers. The hearing examiner issued a proposed report and order recommending grant of the application on the ground that need for the service had been shown (R. 365).

Upon exceptions to the examiner's recommended report and order, and replies thereto, the Commission, Division 1, issued its report and order (R. 385) rejecting the examiner's recommendation and denying the application for the stated reason that "applicant has failed to establish that the proposed operation will be consistent with the public interest and the national transportation policy" (R. 395). The Commission made numerous subsidiary findings supporting its conclusion, stating (R. 393-395) (1) that

<sup>1</sup> Steel Canning Co., Cain Canning Co., Inc., and Keystone Packing Co.

<sup>2</sup> The map appearing at R. 32-33 provides a good visual aid to the extensive area involved.

"Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries," (2) that the "protesting carriers are authorized to serve the origin points involved and \* \* \* numerous points in the vast 33-State destination territory \* \* \*," and "They are willing to make multiple pickups and they offer stopoff-in-transit delivery service," (3) that "the service required by the shippers [is in no] way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities \* \* \* and \* \* \* could be performed by protesting common carriers as well as by applicant," (4) "that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant," and (5) "In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application." The Commission concluded: "There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract-carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers \* \* \* their support of this application rests entirely upon a desire to obtain

lower rates" which " \* \* \* is not a sufficient basis to justify a grant of authority to a new carrier."

Appellee Reddish timely filed a petition for reconsideration and oral argument to which the protesting motor and rail carriers replied. In addition, the Contract Carrier Conference and the Regular Common Carrier Conference of the American Trucking Associations, Inc., each filed petitions for leave to intervene and the Contract Carrier Conference also sought reconsideration. By order dated December 16, 1959, the entire Commission granted both petitions for leave to intervene and denied the petitions for reconsideration.

Reddish then instituted an action in the court below to set aside the orders of the Commission. The court below permitted the Contract Carrier Conference to intervene as a plaintiff and 7 of the motor carrier protestants, 32 rail carrier protestants in Western Trunk Line Territory, and the Regular Common Carrier Conference to intervene as defendants.

The Department of Justice, representing the United States of America as statutory defendant, confessed error in its answer and actively argued for reversal of the Commission's order on the grounds that the Commission failed to give sufficient weight to the applicant's proposed lower rates and that the order was not supported by substantial evidence (R. 15).

On October 19, 1960, the District Court rendered its opinion and judgment (R. 398, 411), setting aside the Commission's orders and enjoining their enforcement and remanding the cause to the Commission for further consideration. The court held (1) that the 1957

amendments to section 209(b) forbid consideration of adequacy of existing service in determining whether a denial of a contract carrier application would adversely affect the supporting shippers (R. 406), (2) that denial of the application would adversely affect the supporting shippers as they require a special service which cannot be supplied by existing common carriers, and (3) that the Commission must consider the lower rates of a contract carrier service in its evaluation of the effect of a denial of the permit upon the supporting shippers (R. 409).

The Commission, the railroads, the motor carriers, and the Regular Common Carrier Conference of the American Trucking Associations, Inc., took separate appeals (R. 412, 416, 418), and this Court noted probable jurisdiction (R. 421).

#### SUMMARY OF ARGUMENT

##### I

Since the question of whether the Commission may consider the availability of adequate common carrier service in passing upon applications for contract carrier permits is common to both this case and *Interstate Commerce Commission v. J-T Transport Company, Inc., et al.*, No. 17, October Term 1961, we respectfully refer the Court to Chapter I of the brief of the Interstate Commerce Commission in No. 17, where that question is fully discussed.

##### II

In determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy, Section 209(b) of the Inter-



state Commerce Act requires the Commission to consider, among other things, "the nature of the service proposed." In order to fall within the term "contract carrier by motor vehicle," as defined in Section 203(a)(15) of the Act, the furnishing of transportation services, under continuing contracts with one or a limited number of persons, must be "through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served" or "designed to meet the distinct need of each individual customer." The Commission found that the supporting shippers require a motor carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickup and deliveries, which service is in no way different than that which existing motor common carriers are rendering daily, by direct or joint-line service, to countless other shippers of the same or similar commodities. The district court rejected the Commission's findings and substituted its own view that the shippers require a special service and lower rates which cannot be supplied by existing common carriers. However, we show below that the Commission's findings are amply supported by the record.

In further rejecting the Commission's findings that a more positive showing than a mere generalized claim is required to establish that existing service will not meet the reasonable transportation needs of the shippers, the court below errs as a matter of law and as a matter of fact. Aside from evidence pertaining to dissatisfaction with existing common-carrier less-than-truckload rates, the record is devoid of any

substantial showing of shipper dissatisfaction with existing service, and there is substantial evidence that the protesting common carriers are able and willing to meet the shippers' needs. In order that the Commission may conduct its proceedings in a manner which will promote sound transportation it must be allowed to reject generalized claims of inadequacy of existing service when the overwhelming evidence is to the contrary. Dissatisfaction with a service because it is alleged that the rates are too high is vastly different than dissatisfaction because the services rendered do not meet the shippers' transportation needs. The Commission's judgment in this regard is reasonable and conforms to the policy of the Act. Proper utilization of the Commission's expertise in transportation matters requires that this Court sustain the Commission's power to reject unsupported generalized claims of inadequacy and require specific proof thereof before finding that the granting of a permit to conduct a new operation will be consistent with the public interest and the National Transportation Policy.

We submit that in substituting its own judgment, findings, and evaluation of the record for those of the Commission, the district court usurped the Commission's administrative function, calling for the application of the principle expressed by this Court in *United States v. Pierce Auto Freight Lines*, 327 U.S. 513, 535-536. By Section 209(b), Congress empowered the Commission to exercise its judgment to determine the nature of the service proposed and the effect of a denial upon the shipper. Proper ad-

ministration of the Interstate Commerce Act requires that the Commission, not the reviewing court, make these critical and difficult factual determinations.

### III

In considering the effect of a grant of the permit upon the services of existing carriers, the Commission properly concluded that granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting carriers, by withdrawing potential traffic which they can adequately handle and should have the opportunity to handle before an additional service is authorized. In rejecting this conclusion, the court below placed controlling emphasis upon the claims of the shippers that existing carriers would not handle the traffic if the permit is denied, since they will resort to private carriage. Such assertions by shippers are not, and should not be controlling. *American Trucking Associations v. United States*, 364 U.S. 1, 18. Since the Commission relied on its *J-T* decision in deposing of this issue, and since this identical issue is discussed in the *J-T* case, No. 17, the Court is respectfully referred to the brief of the Interstate Commerce Commission in that case.

### IV

A. The Commission's consistent position that rates are not relevant in determining applications for motor carrier operating authority has been judicially approved and is consistent with the Congressional policy of maintaining a sound national transportation sys-

tem by protecting that system from over-competition. The court below errs when, without citation of judicial precedent or statutory authority, it rejects this consistent practice and holds that the National Transportation Policy's goal to promote "economical" service requires the Commission to consider an applicant's proposed lower rates in its evaluation, under Section 209(b), of the effect of a denial of a permit upon the supporting shippers. The lower court's decision has the effect of making contract carriage a distinct mode of motor transportation apart from common carriage. We submit that the term "modes of transportation" in the National Transportation Policy is manifestly used in a broad context, distinguishing the modes by their fundamental physical characteristics, *e.g.*, rail, motor, and water, and was not intended to draw a modal line between the often overlapping services of motor common and contract carriers.

In addition, the decision below, by making rate levels a relevant issue\* in application proceedings, would substantially broaden the range of relevant issues and evidence in such proceedings, prolonging their disposition. Nothing in the 1957 amendments or in their legislative history suggests that Congress intended such a drastic and impracticable procedural result.

B. There is nothing in the record to support the independent finding of the court below that the applicant's proposed lower rates reflect economies and advantages of his proposed contract carrier operation in this situation. The costs of performing various transportation services vary too widely to permit a

presumption that a particular service can be performed by a contract carrier at lower costs than by common carriers.

#### ARGUMENT

### I

THE EXISTENCE OF AUTHORIZED COMMON CARRIERS ABLE AND WILLING TO PROVIDE SERVICE ADEQUATE TO FULFILL THE TRANSPORTATION REQUIREMENTS OF THE SUPPORTING SHIPPER IS A RELEVANT FACTOR WHICH THE COMMISSION HAS THE POWER AND DUTY TO CONSIDER IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT PURSUANT TO SECTION 209(B) OF THE INTERSTATE COMMERCE ACT

This is a companion case to *Interstate Commerce Commission v. J-T Transport Company, Inc., et al.*, No. 17, October Term 1961, involving, in addition to the questions presented in that case, the further question of whether the Commission is required to consider the proposed lower rates of an applicant for a contract carrier permit in its evaluation, under Section 209(b) of the Act, of the effect of a denial of the permit upon the supporting shippers.

In Chapter I of our brief in this Court in No. 17, we have shown that the Congressional purpose in requiring authorization for all interstate for-hire motor carrier operations was to promote stability in the motor carrier transportation system by preserving it from over-competition, that the promotion and protection of adequate and efficient common carriage is a specific objective, and that these objectives are reflected in the National Transportation Policy's injunction that the Act be administered to foster sound economic conditions in transportation. There, we have

also dealt with the Commission's consistent administrative practice, prior to the 1957 amendments, under the "consistent with the public interest and the national transportation policy" standard of Section 209 (b), and have discussed the pertinent legislative background of those amendments. Consequently, we shall not duplicate that material here, but respectfully refer the Court to that discussion.

## II

THE COMMISSION'S FINDINGS WITH RESPECT TO THE EFFECT WHICH DENYING THE PERMIT WOULD HAVE UPON THE SHIPPLERS WERE MADE AFTER EVALUATING AND WEIGHING CONFLICTING EVIDENCE, WERE REASONABLE AND PROPER, AND SHOULD NOT HAVE BEEN OVERTURNED BY THE LOWER COURT'S SUBSTITUTION OF ITS OWN FINDINGS ON THIS ISSUE

A. There is a factual difference between this case and the *J-T Transport* case. In *J-T Transport*, the protesting common carrier is engaged in performing the same highly specialized transportation service with special equipment as was proposed by the applicant. Here, the applicant seeks to perform a commonplace service in the transportation of canned goods in standard equipment, such as the many protesting motor common carriers perform.

There is no material dispute as to the factual situation, which is fully discussed in the Commission's report (R. 388-391). Steele Canning Company, the primary shipper, ships a substantial volume of canned goods in straight truckload lots to points in the 33-



State area involved. In addition to manufacturing and selling its own canned goods, Steele purchases and distributes about 75% of Cain's and Keystone's annual production, taking title at the supplier's plant and arranging for pickup and delivery to customers by Reddish, who was granted temporary authority to conduct contract carrier operations for Steele in 1958, because a strike of Steele's drivers caused it to terminate its private carrier operations. A majority of Steele's shipments are combined loads of small volume orders for several customers requiring expeditious service. Often these combined loads are comprised of shipments picked up at more than one of the plants of its suppliers, and the movement requires up to six or more stops en route for delivery to consignees in two or more States. Its customers maintain a low inventory requiring Steele to make deliveries promptly. Steele desires a single line service to all points and asserts that on less-than-truckload shipments existing carriers are unable to provide multiple pickup and multiple delivery service, and that such existing service is not expeditious. Its support of the application is primarily predicated on its opinion that existing common carrier rates on less-than-truckload shipments are prohibitive. Asserting that its competitors ship by private carriage and that there is only a small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that it would be forced out of business if it had to ship its numerous small orders of canned goods in less-than-truckload quantities, at less-than-truckload common carrier rates, and that success-

ful operation of its business necessitates the movement of this traffic in consolidated loads, either by private carriage or by for-hire motor carriers at truckload rates. Steele desires to terminate private carrier operations because of labor difficulties, but asserts that it will continue such private operations if the application is denied without resorting to further common-carrier service because such carrier's less-than-truckload rates are considered prohibitive.

The testimony of the other two shippers in support of the application is similar. Each supplies 75 percent of its output to Steele but desires to sell a substantial portion of production to prospective customers at various points in the States involved so as not to be dependent on one large customer for sale of its products. Prior to the strike of Steele's drivers, Cain never sold direct to customers, that portion of production not sold to Steele having been purchased by other canning companies in Arkansas and Oklahoma, who picked up the freight at Cain's plant. Since the strike, Cain has made several direct sales to customers at Kansas City, St. Louis, and Chicago, where they were satisfactorily transported by Jones Truck Lines, Inc. Cain fears inability to expand its sales area if forced to ship at less-than-truckload common carrier rates, and that said carriers will be unable to handle small shipments in combined loads. Admittedly, Cain is not familiar with the service provided by existing motor carriers, and supports Reddish on inbound shipments of materials so as to insure him a balanced operation and enable him to render a better service on outbound movements. On the other

hand, Keystone has sold that portion of its production not purchased by Steele to customers at several points in the territory involved, shipping by existing motor common carrier service in truckload quantities. Such service is satisfactory, but Keystone is convinced that it would be unable to ship less-than-truckload traffic because of existing common carrier rates. Keystone desires to obtain sales and ship freight in loads requiring delivery at two or more points en route and at truckload rates for each shipment, no matter what the size thereof. This shipper operates two trucks in private carriage and asserts that it will supplement its fleet if the application is denied and its small orders increase.

A number of motor common carriers opposed the application and presented evidence of their authorities and operations. By either direct or joint-line service, they can provide service to substantially all points involved in the application. Each of the opposing common carriers operates a substantial amount of equipment suitable for the transportation of canned goods and renders a daily service to other manufacturers of the same or similar commodities, and all desire an opportunity to provide the service proposed. Although the three supporting shippers generally had knowledge of the availability of service from the protestant common carriers, none of the protestants has participated in the involved traffic of Steele because of the higher less-than-truckload rates.

The railroad protestants operate extensively throughout the territory sought to be served by Reddish. Canned goods constitute a substantial part of their traffic,<sup>3</sup> and they have been experiencing a sharp decline in canned goods tonnage. They have participated in outbound movements of the shippers' traffic, but to a greater extent have handled inbound movements of materials and supplies. They contended that they are able to provide the needed service and that the shippers have failed to take full advantage of their facilities and services.

On the basis of the above evidence, the Commission made findings in accordance with the requirements of Section 209(b) of the Act which the court below rejected, substituting findings of its own.

B. Section 203(a)(15), 49 U.S.C. 303(a)(15), defines the term "contract carrier by motor vehicle" to mean:

\* \* \* Any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation \* \* \*, under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time

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<sup>3</sup> The significance of this traffic to the railroads, as well as the circumstance that many of Reddish's competitors utilize common carrier service, is reflected in the fact that in the year ended June 30, 1958, it is estimated that the railroads transported 9,164,000 tons, or 45% of the total movement, of canned foods, and that the rail share is substantially greater for the longer hauls. *Transportation and Distribution of Canned Foods*, U.S. Department of Commerce, Bureau of the Census, October 1959.

to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

This definition of a contract carrier is carried over in Section 209(b) of the Act which requires the Commission, in determining whether issuance of the permit will be consistent with the public interest and the national transportation policy, to consider, among other stated factors, "the number of shippers to be served by the applicant," and "the nature of the service proposed."

The Commission found that Reddish met the requirements of the first criterion listed in Section 209(b), the number of shippers to be served (R. 393), but determined, under the second criterion, that the nature of the proposed service (*ibid*):

\* \* \* requires a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate.\* They

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\* Record references to such evidence as supports the findings of the Commission are interlineated here for convenience. See R. 274-277, 289-291, 302-305, 309-311, 315-316, 322-325, 331, 335, 339-341, 349-350.

are willing to make multiple pickups and they offer stopoff in transit delivery service.<sup>5</sup> The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities.<sup>6</sup> This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted.

In its opinion (R. 405-406, 409-410), the court below rejects the Commission's findings and substitutes its view that the shippers require a special service, and the lower rates of such a service, which cannot be supplied by existing common carriers.

The record conclusively establishes that Reddish does not propose to dedicate equipment to the exclusive use of any particular shipper (R. 62, 88, 107-108, 112) or to institute a specialized or distinct service which would be materially different from that offered by existing motor common carriers. Both Reddish and the existing common carriers operate with standard equipment—tractors with van semitrailers. Each offers a less-than-truckload service, i.e., a relatively small shipment from one consignor to one consignee. Each would be authorized to render truckload service, i.e., one large shipment of a specified minimum volume from one consignor to one consignee. Each would

<sup>5</sup> See R. 278, 290, 303, 310-311, 316, 354.

<sup>6</sup> R. 276-277, 290, 307, 311, 317, 339-341, 354, 358.



be authorized to render a truckload service with stopping-in-transit privileges for partial unloading, i.e., a large shipment from one consignor to a number of different consignees at different locations, with a truckload rate being assessed plus an additional charge for each stop in transit. Thus, the proposed service of Reddish is practically identical to that offered by the existing common carriers. The only difference which would distinguish his proposed service from that offered by existing carriers is Reddish's lower level of rates for a single-line service. In the actual use of his W-2 tariff,<sup>7</sup> which was filed to cover transportation under temporary authority, Reddish offered several stops in transit at the truckload rate and assessed no stopping-in-transit charge<sup>8</sup> (R. 84), although such a charge is contemplated by the tariff (R. 191), thus rendering what is tantamount to a less-than-truckload service at truckload rates.

Moreover, the only evidence in the record which would have any tendency to show distinct need for a specialized type of service is testimony to the effect that some of Steele's customers often specify certain days and times of delivery in their telephone, regular

<sup>7</sup> It should be noted that, in his tariff, Reddish does not obligate himself to transport loads of less than 20,000 pounds on canned goods.

<sup>8</sup> The Commission has consistently held that stopping-in-transit for multiple pickups and deliveries does not constitute transit services within the usually accepted meaning of that term as applied to motor carriers. They are extra transportation services for which the motor carrier is entitled to receive just and reasonable compensation. See, e.g., *Multiple Deliveries, New England*, 69 M.C.C. 77, 79; *Stopping in Transit, Central Territory*, 51 M.C.C. 25, and 52 M.C.C. 59.

mail or wire orders (R. 128, 130). These customers and the area in which they are located were unnamed, and there is nothing to suggest that such customer requests preclude the use of common carrier service in Steele's operations or the canning industry generally. In the Commission's judgment, such generalized claims of need, although considered, would not justify a finding that Steele's needs were such as could not be met by existing common carrier services.

The Commission further found (R. 394):

\* \* \* Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations for achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried in recent years. As for inbound shipments, shippers admit that

there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs,\* we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application.

As a consequence, the Commission concluded that there "has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service," and that the shippers' support of the application rests entirely upon a desire to obtain lower rates rather than upon an inability to obtain service (R. 395).

Although apparently recognizing that the services of the existing carriers had been almost completely untried in recent years, the court below rejected the

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\* Although the district court criticized this language (R. 410), we submit that the phrase "reasonable transportation needs" is merely intended to distinguish between legitimate, proven needs, and unreasonable demands bordering on shipper whim which no regulated carrier should be expected to be in a position to meet, for example, the call at midnight for a truck to be at the shipper's place of business in five minutes. Certainly, shipper needs must be evaluated realistically, and there can be no obligation to satisfy unreasonable demands for the perfect service. If this were not so, the shipper would be armed with a simple device through which it could control the granting of an application. "Reasonable transportation needs" by no means excludes special, distinct, or individualized needs of a shipper. He is fully entitled to have his actual needs filled and it is such needs that the Commission considered and found the existing service adequate to meet.

Commission's conclusion on the basis that the shippers are reasonably familiar with those services and had asserted that they considered them inadequate (R. 405-406, 508).

We suggest that in deciding that the Commission may no longer reject general assertions of inadequacy of existing service, the court below errs as a matter of law in restricting the Commission's function of evaluating testimony as to shippers' needs in relation to existing services. Moreover, the record in this proceeding contains no evidence establishing any inadequacy in the less-than-truckload service of existing carriers, other than that their rates for less-than-truckload shipments were higher than proposed for Reddish's contract carrier service. The Commission weighed the shippers' generalized claims of inadequacy of existing common-carrier less-than-truckload service as being too slow and too costly, against the specific affirmative evidence introduced by the protesting carriers as to the origin and destination points each was authorized to serve, their willingness and desire to obtain the traffic and make multiple stop-offs in transit for pickups and deliveries (R. 391-392), and the fact that existing service (except for Jones Truck Lines, Inc.)<sup>10</sup> had been almost completely

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<sup>10</sup> Jones Truck Lines did not oppose the application because the application was tailored, by amendment at the hearing, to eliminate the points which Jones serves direct (R. 10-11). The court below, therefore, incorrectly stated that " \* \* \* Jones Truck Lines, Inc., in Springdale, Arkansas, \* \* \* supports the plaintiff's application to handle the less-than-truckload orders" (R. 401).

untried in recent years." On balance, it found an absence of need for the proposed service.

In the face of the positive evidence of the protesting common carriers demonstrating the adequacy of their service, the Commission was justified in saying that more than general assertions are required to support a grant of authority. There is a material difference between a claim that the actual service being offered and rendered by existing carriers is inadequate because the rates are too high,<sup>11</sup> and a showing that shippers require a transportation service designed to meet their distinct needs which cannot be satisfied by existing carriers.

In sum, we submit that Congress has empowered the Commission to exercise its administrative judgment in determining the nature of the service proposed and the effect of a denial upon the shipper; that the Commission has reached a permissible judgment on the record before it; and that, in overturning that judgment, the district court exceeded the proper function of a reviewing court by making findings based upon its own evaluation of the evidence, *Universal Camera Corp. v. Labor Board*, 340 U.S. 474,

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<sup>11</sup> See R. 133, 151-155, 172-173, 176, 178-179, 184-187, 189, 191-192, 196-197, 199, 201, 205, 209-210, 211-212, 220, 224-225, 226, 229, 231, 242, 244, 252, 254-255, 257-258, 261, 266-267.

<sup>12</sup> This is not the type of situation where the Commission could authorize an additional carrier because the evidence showed that while existing carriers held adequate authority their rates were so high as to constitute an embargo on the traffic. Here the existing carriers want the traffic but have never enjoyed it. Cf., *Interstate Dress Carriers, Inc.*, 77 M.C.C. 787, 791 (1958); *Carl Subler Trucking, Inc., Ext. Southern States*, 77 M.C.C. 707, 713 (1958).

488; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-536; *Gray v. Powell*, 314 U.S. 402.

### III

IN CONSIDERING THE EFFECT OF A GRANT UPON EXISTING CARRIERS, THE COMMISSION PROPERLY CONCLUDED THAT GRANTING THE PERMIT WOULD BE INIMICAL TO THE PRESERVATION OF SOUND ECONOMIC CONDITIONS IN TRANSPORTATION AND WOULD ADVERSELY AFFECT THE SERVICES OF THE PROTESTING CARRIERS BY WITHDRAWING POTENTIAL TRAFFIC THEY CAN HANDLE ADEQUATELY AND SHOULD HAVE THE OPPORTUNITY TO HANDLE BEFORE AN ADDITIONAL SERVICE IS AUTHORIZED.

In flatly rejecting the Commission's conclusion and rationale respecting the third criterion in Section 209(b), "the effect which granting the permit would have upon the services of the protesting carriers" (R. 394),<sup>13</sup> the district court concluded (R. 410):

In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

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<sup>13</sup> In citing the *J-T* case, 79 M.C.C. 695, the Commission said here (R. 394):

"It is clear that authorization of a new carrier to transport traffic which a common-carrier protestant can efficiently handle would have an adverse effect upon the services of the protestant."



Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied.

Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier. \* \* \*

First, we note that assertions by shippers that existing common carriers would not handle the traffic if the permit were denied are not controlling. If they were, shippers could dictate to the Commission and its discretionary powers under section 209(b), and the National Transportation Policy would be wiped out. As this Court observed in *American Trucking Associations v. United States*, 364 U.S. 1, 18, where the question involved was standing of existing carriers to contest an order of the Commission granting new rights:

\* \* \* And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. \* \* \*

The point is that, while a shipper is always perfectly free to transport its own goods, to the extent that public transportation will be utilized the able and willing existing carriers will get the traffic.

As we have shown in Chapter II of this brief, the Commission gave due consideration to the shipper's needs and properly found that the existing common carriers were fully able and willing to fulfill them. In our opinion, the real issue here is the same as that in the *J-T* case, No. 17: Whether the Commission abused its discretion and unlawfully administered the statute in concluding that, where existing common carrier service is adequate to meet the shipper's transportation needs, granting the permit would be inimical to the preservation of sound economic conditions in transportation and would adversely affect the services of the protesting common carriers by withdrawing potential traffic which they can handle adequately and should be given the opportunity to handle before an additional service is authorized. Since the Commission relied on its *J-T* decision in disposing of this case, and since this issue is fully discussed in our *J-T* Brief before this Court at Chapter II., B., we respectfully refer the court to that discussion.

#### IV

**THE COMMISSION IS NOT REQUIRED TO CONSIDER AN APPLICANT'S PROPOSED RATES IN DETERMINING AN APPLICATION FOR A CONTRACT CARRIER PERMIT**

In addition to questions presented in the *J-T Transport* case, this case adds the important issue of the extent to which the Commission must consider the lower rates proposed by an applicant for a contract carrier permit. The Commission found (R. 395):

There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common-carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied.

Without citation of judicial precedent or statutory authority," the court below holds (R. 409) that the 1957 amendments to the contract carrier provisions of the Act overturn this long-established principle of refusing to consider rates in an application proceeding. Assuming that Reddish's lower rates result from economies and advantages inherent in contract carrier operations, and that efficient operation of the shippers' business requires a "tailored" transportation service with its lower rates, the lower court held that the National Transportation Policy's goal to pro-

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"The 1957 amendments are not authority for displacing this principle since the question of rates is not mentioned in the amendments or their legislative history.

mote "economical" service requires the Commission to consider such lower rates in its evaluation, under Section 209(b), of the effect of a denial of a permit upon the supporting shippers. This was error as a matter of law and as a matter of fact.

- A. THE COMMISSION'S LONG-STANDING POLICY OF REFUSING TO CONSIDER THE LEVEL OF RATES IN AN APPLICATION PROCEEDING INVOLVING THE SAME MODE OF TRANSPORTATION HAS RECEIVED JUDICIAL APPROVAL AND IS CONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY

During the more than twenty years which have elapsed since passage of the Motor Carrier Act of 1935, the Commission has consistently held that the level of rates is not a proper matter for consideration in application proceedings for motor common<sup>15</sup> or contract carrier<sup>16</sup> authority, or in proceedings for unification of motor carriers,<sup>17</sup> unless it is demonstrated that existing rates are so unreasonably high as to constitute, in effect, an embargo. This consistent policy has been approved by the Court in *American*

<sup>15</sup> See e.g., *Wellspeak Common Carrier Application*, 1 M.C.C. 712, 715-716 (1937); *Detroit-Pittsburgh Motor Freight, Inc., Extension—Asphalt Roofing*, 79 M.C.C. 197, 203 (1959); *Interstate Dress Carriers, Inc., Extension—Waterboro, S.C.*, 77 M.C.C. 787, 791 (1958); *Carl Subler Trucking, Inc., Extension—Southern States*, 77 M.C.C. 707, 713 (1958). *Atlanta & New Orleans Motor Freight Co. v. United States*, 155 F. Supp. 68, 71 (U.S.D.C. N.D. Ga.—Atlanta Div.—1953).

<sup>16</sup> *Dixon & Koster Contract Carrier Application*, 32 M.C.C. 1, 4 (1942); *Southland Produce Co., Inc., Contract Carrier Application*, 81 M.C.C. 625, 628-629 (1959); *Motor Corp., Extension—Sugar*, 73 M.C.C. 731, 734 (1957); *Badger Trucking Co., Inc., Extension—Building Materials*, 66 M.C.C. 373, 374 (1956).

<sup>17</sup> *Rock Island M. Transit Co.—Purchase—White M. Freight, Inc.*, 5 M.C.C. 451, 457 (1938).

*Trucking Associations v. United States*, 326 U.S. 77, at 86, where it was observed:

\* \* \* It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of Section 217 of Part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of Section 220 of the same part to which other motor carriers are subject.<sup>12</sup> *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.* [Emphasis supplied.]

Again, in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, at 91-92, the Court discussed, with apparent approval, the Commission's long standing practice.

\* \* \* The Commission asserts that it has always considered rates irrelevant in certification proceedings under §207(a), yet, with but one exception, it relied on administrative decisions involving applications by a carrier to provide service to an area already served by the same mode of transportation. \* \* \* Those decisions are entirely different from the situation presented here, where a motor carrier seeks to compete for traffic now handled exclusively by rail service. In these circumstances a rate benefit attributable to differences between the two modes of transportation is an

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<sup>12</sup> A method of objection to improper practices, such as unreasonable tariffs or irregular accounting by motor carriers under the Interstate Commerce Act, part II, is provided by Section 204(c) as amended, 49 U.S.C. § 304(c).

“inherent advantage” of the competing type of carrier and cannot be ignored by the Commission.

Likewise, this Court affirmed, *per curiam*, a district court decision sustaining the Commission refusal to consider a rate question in a Section 207(a) proceeding where the application was opposed by motor carriers. *Railway Express Agency, Inc. v. United States*, 153 F. Supp. 738, 741 S.D.N.Y., 1957, affirmed 355 U.S. 270.

The Commission's judicially approved practice of refusing to consider the level of rates in an application proceeding, is based upon compelling considerations. To begin with, the entire structure of the Interstate Commerce Act treats separately the matters of service and rates. Moreover, the motor carrier certificate and permit provisions of Part II reflect the dominant Congressional purpose to eliminate destructive over-competition and thereby foster a healthy and stable transportation system. *American Trucking Associations v. United States*, 344 U.S. 298, 312-313. To permit rate competition to become a relevant and often decisive issue in application proceedings would be utterly inconsistent with the objectives and structure of the Act.

In addition, if the rates to be charged by an applicant are relevant to whether an application should be granted, then the lawfulness of the proposed rates can be challenged by protesting carriers, thus vastly broadening the range of relevant issues and evidence in the proceeding. The result would be to prolong



and make more expensive proceedings which already have been criticized as cumbersome.

Section 218(a) requires motor contract carriers to establish, file, and observe reasonable minimum rates and charges. Section 218(b) empowers the Commission to prescribe just and reasonable minimum rates for contract carriers and enumerates factors which the Commission must take into account in prescribing such rates; among such factors are the cost of the services rendered by the contract carrier and whether the prescribed minimum rate will give an advantage to any contract carrier in competition with any motor common carrier. These statutory provisions as to minimum rates of contract carriers illustrate the complete impracticability of considering rates in an application proceeding.

Moreover, the rate issue would often be completely illusory in that, if the application were granted, the applicant would not necessarily maintain its proposed lower rates; indeed actual operating experience might compel it to raise its rates. Thus, to give decisive weight to an applicant's proposed lower rates, the practical result of the lower court's opinion, is bound to result in the establishment of uneconomical or unnecessary transportation services—both inconsistent with the objectives of the National Transportation Policy.

One further matter requires comment. We have no quarrel with the district court's observation (R. 403) that "the goal of the national transportation policy encompasses all modes and all carriers subject to regulation." However, while it did not decide that

motor contract carriers are a distinct mode of transportation apart from motor common carriers, the district court's decision has that effect when it concludes that Reddish's "lower rates result from economies and advantages inherent in contract operations." All the reported cases concerning modes of transportation have dealt with the interrelation of rail, motor, and water carriers, and this Court has not split hairs between contract and common carriers within these groups so as to require the Commission to give weight to the advantages which one class of carriers in a distinct mode of transportation might have over another class within the same mode. See, *e.g.* *Schaffer Transportation Co. v. United States*, 355 U.S. 83 (rail vs. motor); *Interstate Commerce Commission v. Meckling*, 330 U.S. 567 (rail vs. water); *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (rail vs. motor).

The term "modes of transportation" in the National Transportation Policy is manifestly used in a broad context which distinguishes the modes by their fundamental physical characteristics. While there are differences between common and contract carriers by motor vehicle, the differences are not in physical characteristics, but in the nature of the holding out and the type of specialized service rendered. There are several different classifications of motor carriers, but all render a transportation service by motor vehicle over the highways. Contract and common carriage by motor vehicle are not separate modes of transportation. Rather they are subdivisions of the same mode. Common and contract carriage overlap to a

considerable extent, and the service which a contract carrier proposes may be duplicated by common carriers. Consequently, where it appears that a motor common carrier is able to furnish the same service as that proposed by a motor contract carrier applicant, no statute or case law negates the Commission's long-continued policy of refusing to give consideration to the desire of shippers to obtain a lower level of rates.

The court below fundamentally errs when it finds a deliberate and drastic change in the underlying purpose of the Motor Carrier Act and in the requirements of the National Transportation Policy. While Section 209(b), as amended in 1957, requires the Commission to consider the effect of a denial upon the supporting shippers, there is not a word in the history of the 1957 amendments to suggest that the Congress intended for the first time to require the Commission to go beyond service considerations in determining applications for contract carrier permits.

**B. THERE IS A TOTAL LACK OF EVIDENCE TO SUPPORT A FINDING THAT THE PROFFERED LOWER RATES RESULT FROM ECONOMIES AND ADVANTAGES INHERENT IN THE PROPOSED CONTRACT CARRIER OPERATIONS**

The court below stated (R. 409):

We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this in-

stance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded.

There is not a scintilla of evidence in the record which would establish that the proposed lower rates result from economies, advantages, or more efficient operation of Reddish's contract carrier service. The record is completely devoid of evidence of Reddish's costs of operation or the costs of common carrier operations.<sup>19</sup> The absence of such evidence prevents any comparison which could result in the finding made by the district court.

The only materials as to contract costs which were presented to the court (not to the Commission) consisted of quotations from textbooks in the brief of the Department of Justice. Obviously, such materials do not constitute evidence upon which the lower court (or the Commission) could find that the proposed lower rates reflect economies and advantages of contract carriage *in this situation*.

Whether a contract carrier can render the same service as common carriers at lower rates than the latter depends upon circumstances which can vary from case to case. Often a contract carrier can

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<sup>19</sup> Some of which are irregular route carriers operating with only one terminal the same as Reddish (R. 282, 288).

provide transportation at rates less than common carriers because it refuses all except high-rated traffic; but even then a balanced operation, i.e., loads in both directions, is necessary. Too much empty vehicle mileage, as where most of the traffic is in one direction, often will cause costs to soar.<sup>30</sup> Obviously, there are many considerations that must be taken into account before it can be ascertained whether a contract carrier is able to perform a particular transportation service profitably at rates lower than common carriers. It is not necessarily true that a contract carrier's cost will be lower than those of a common carrier where the service to be performed is similar. Whether Reddish could render a less-than-truckload service with multiple deliveries at truckload rates without assessing a stop-in-transit charge (which his tariff calls for but which he does not assess) would have to be determined by a detailed cost accounting analysis not present in this record.

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<sup>30</sup> Here inbound authority is also requested but only to permit Reddish to obtain a balanced operation. No claims were made by the shippers of inadequacy of such present service or that the rates therefor are too high.

**CONCLUSION**

For all of the foregoing reasons, the judgment of the District Court should be reversed and the cause remanded with directions to dismiss the complaint.

Respectfully submitted.

ROBERT W. GINNANE,

*General Counsel,*

B. FRANKLIN TAYLOR, JR.,

*Associate General Counsel,*

ARTHUR J. CERRA,

*Assistant General Counsel,*

*Interstate Commerce Commission,*

*Washington 25, D.C.*

*Attorneys for the Interstate Commerce Commission.*

SEPTEMBER 1, 1961.



## APPENDIX

### STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides as follows:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., provides as follows:

Sec. 203. (a) As used in this part—

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-12, Public Law 85-463, 85th Cong., provides as follows:

Sec. 209.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent

authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carriers shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit;

or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

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**SUPREME COURT. U. S.**  
**No. 54**

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JAMES H. BROWNING, Clerk

**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1961**

**ARKANSAS-BEST FREIGHT SYSTEM, INC.**  
**EAST TEXAS MOTOR FREIGHT LINES, INC.**  
**GILLETTE MOTOR TRANSPORT, INC.**  
**WESTERN TRUCK LINES, LTD.**

**and**

**REGULAR COMMON CARRIER CONFERENCE OF**  
**AMERICAN TRUCKING ASSOCIATIONS, INC.,**  
*Appellants*

**v.**

**ELVIN L. REDDISH, ET AL.,**  
*Appellees*

**On Appeal from the United States District Court for the**  
**Western District of Arkansas—Ft. Smith Division**

**APPELLANTS' BRIEF**

**JOHN S. FESSENDEN**  
**ROLAND RICE**  
618 Perpetual Bldg.  
1111 E Street, N. W.  
Washington 4, D. C.

**ROLLO E. KIDWELL**  
**HUGH T. MATTHEWS**  
2130 Fidelity Union Tower  
Dallas 1, Texas

**J. W. DURDEN**  
**THOMAS HARPER**  
Kelly Building  
P. O. Box 298  
Ft. Smith, Arkansas

*Attorneys for Appellants*

**September 1, 1961**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

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No. 54

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ARKANSAS-BEST FREIGHT SYSTEM, INC.  
EAST TEXAS MOTOR FREIGHT LINES, INC.  
GILLETTE MOTOR TRANSPORT, INC.  
WESTERN TRUCK LINES, LTD.

and

REGULAR COMMON CARRIER CONFERENCE OF  
AMERICAN TRUCKING ASSOCIATIONS, INC.,

*Appellants*

v.

ELVIN L. REDDISH, ET AL.,

*Appellees*

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On Appeal from the United States District Court for the  
Western District of Arkansas—Ft. Smith Division

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**APPELLANTS' BRIEF**

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**OPINIONS BELOW**

The opinion of the United States District Court for the Western District of Arkansas (R. 398) is reported at 188 F. Supp. 160. The decision of Division 1 of the Interstate Commerce Commission (R. 385) appears at 81 M.C.C. 35. By order dated December 16, 1959 (R.

396) the entire Commission denied reconsideration of the decision of Division 1.

### **JURISDICTION**

The judgment of the district court (R. 411) was entered on October 19, 1960, and notice of appeal was filed in that court by Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and the Regular Common Carrier Conference of the American Trucking Associations, Inc., (R. 418) on December 16, 1960. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101 (b) and is sustained by the following decisions: *Frozen Food Express, Inc. v. U. S.*, 351 U.S. 40 (1956); *American Trucking Associations, Inc., et al. v. Frisco Transportation*, 358 U.S. 133 (1958); and *American Trucking Associations, Inc., et al. v. U. S., et al.*, 364 U.S. 1 (1960). Probable jurisdiction was noted April 17, 1961, and this case was consolidated with Nos. 49 and 53 which are separate appeals from the same judgment by other parties.

### **STATUTE INVOLVED**

The National Transportation Policy, 49 U.S.C., preceding § 1, and §§ 203(a)(15), 209(b), 216(b), 216(d), and 218(b) of the Interstate Commerce Act, 49 U.S.C. §§ 303 (a)(15), 309(b), 316(b), 316(d), and 318(b), are set forth verbatim in Appendix A attached hereto.

### **QUESTIONS PRESENTED**

1. Whether under the 1957 Amendments to § 209(b) of the Interstate Commerce Act the district court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.



2. Whether the district court erred in holding that the Commission, in determining whether issuance of a permit under § 209(b) is consistent with the public interest and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, particularly when the evidence of record before the Commission will not support a finding that such lower rates result from lower costs due to inherent economies and advantages.

3. Whether the district court when substituting its judgment for that of the Interstate Commerce Commission in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

### STATEMENT

E. L. Reddish, one of appellees, filed an application with the Interstate Commerce Commission under § 209 (b) of the Interstate Commerce Act, [49 U.S.C. 309(b)], seeking a permit as a contract carrier by motor vehicle in the transportation of canned goods for three shippers<sup>1</sup> from Springdale, Lowell, and Fort Smith, Arkansas, and Westville, Oklahoma, to numerous points in 33 states and of materials and supplies used in the manufacture of canned goods from 30 of those states to the four named origin points (R. 23-26, 386-387). The application was opposed by a number of rail carriers and by several motor common carriers (R. 37-42).

Reddish will not dedicate equipment to the exclusive use of any particular shipper (R. 107-108), but will use his equipment to serve the three supporting shippers who schedule their loads in accordance with the availability

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<sup>1</sup> Steel Canning Co., Cain Canning Co., Inc., and Keystone Packing Co.

of his equipment (R. 107). That equipment consists of tractors and ordinary van semi-trailers (R. 53, 54, 72).

Reddish holds no permanent operating authority but performed transportation for one of the three shippers under temporary authority issued by the Commission. The circumstances of that transportation were well described by the Commission (81 M.C.C. at 37, R. 388-389), as follows:

"Applicant holds no permanent motor carrier authority. On June 12, 1958, he had nine tractor-trailer units under long-term lease to Steele. Because of a strike of Steele's drivers, applicant obtained temporary authority to transport, under contract with Steele, certain of the involved commodities from and to numerous points which he here proposes to serve. The temporary authority is conditioned to expire upon final determination of this proceeding. Practically all of the outbound shipments were comprised of less-than-truckload shipments for delivery at several points en route, including points in different States. For these small shipments, applicant assessed a rate computed on the basis of his truckload rate, with no extra charge for stopping in transit."

Steele uses common carriers for the transportation of straight truckload shipments (R. 132) but has found that the only way to use common carriers for the movement of small orders is to ship them ltl (less-than-truckload) (R. 133). Ltl service is unsatisfactory because the freight rates are prohibitive to most points (R. 173). Steele desires small shipments to move at truckload rates (R. 173) because ltl rates in some instances are two and three times higher and would throw Steele's products out of the competitive market (R. 193).

Cain uses common carriers for truckload shipments (R. 217-218) and desires a service on ltl quantities at truckload rates (R. 217, 226). Common carrier ltl rates are prohibitive (R. 228). Keystone also uses common carriers (R. 241, 252, 254, 256) and does not ship less-

than-truckload quantities (R. 258). It consolidates its small orders to make up a truckload (R. 259).

On the basis of the foregoing and other evidence of record the Commission (R. 395) found and concluded:

“ \* \* \* the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. \* \* \* If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. \* \* \* ”

With respect to the service available from the protesting carriers the Commission found that by either direct or joint-line service they can provide transportation to substantially all of the points involved (R. 391);<sup>2</sup> that each operates a substantial amount of equipment suitable for the transportation of the commodities here involved (R. 391); that they have handled large and small shipments of the type of traffic involved (R. 392); and that they are willing to provide multiple pick-up and delivery service (R. 392).<sup>3</sup>

In its decision the Commission reviewed in some detail the testimony of the witnesses representing the three shippers with particular reference to the nature of their business (R. 389-391). Thereafter it concluded (R. 393):<sup>4</sup>

<sup>2</sup> See R. 274-277, 289-291, 302-305, 309-311, 315-316, 322-325, 331, 335, 339-341, 349-350.

<sup>3</sup> See R. 278, 290, 303, 310, 311, 316, 354.

<sup>4</sup> See also, the finding of the Hearing Examiner (R. 370) that:

“ \* \* \* It [Steele] is obtaining satisfactory service from the existing motor common carriers on straight truckload ship-

" \* \* \* Shippers require a motor carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protesting carriers are authorized to serve the origin points involved and, either directly or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stop-off-in-transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. \* \* \* "

The Commission went on to consider the effect of denial of the application on Reddish and the three supporting shippers. It said (R. 394):

" \* \* \* Applicant is a new entrant into the field of motor transportation, and we think it clear that a denial of this application could not be said to affect him adversely. Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over

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ments of canned goods from and to the points here involved, and the record indicates that some of these motor carriers have provided satisfactory service on some truckload shipments which required stopoffs for delivery of a portion of the freight at one or two points en route to final destination. \* \* \* "

regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. In fact, the existing service, except for that of Jones Truck Lines, Inc., has been almost completely untried, in recent years. As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation. In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

The district court reversed the decision of the Commission (R. 410). In so doing it said (R. 405):

"Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application; . . ."

Speaking of the same subject at another point in its decision, the court said (R. 409):

"Neither do we believe that lower costs, in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. . . ."

" . . . Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. . . ."

Both of the above statements of the district court were necessarily made in light of the evidence summarized above. However, there is not one scintilla of evidence in the case regarding the operating costs of any carrier, neither Reddish nor any protestant, or regarding either contract or common carriers generally.

The court also held that the 1957 amendments to §§ 203 (a)(15) and 209(b) forbid consideration by the Commission of whether or not existing carrier service is adequate in determining whether approval of a contract carrier application would be consistent with the public interest and the National Transportation Policy (R. 406-408), and substituted its judgment for that of the Commission in holding that the shippers require a special service not available from the protesting carriers (R. 410).

### SUMMARY OF ARGUMENT

In determining whether it is consistent with the public interest and the National Transportation Policy either to grant or to deny contract carrier rights, both to prevent shortages in transportation and to avoid creation of unnecessary service, the Commission must know whether present service is adequate. To require the Commission, as does the court below, to act without regard to the quantum of service presently available, is to require a decision in a factual vacuum.

The level of rates is not at issue in a proceeding for new contract carrier authority under § 209 of the Interstate Commerce Act. Other sections of the Act provide means of testing the reasonableness of rates, and shippers dissatisfied with present rates may not rely upon that dissatisfaction to support a grant of new authority. Moreover, when there is no evidence of record, statistical or otherwise, establishing that contract carriage may be sustained at a proffered lower rate level it is error to hold that such lower rate level reflects inherent economies



and efficiencies distinguishing the proposed service from the available service.

The service proposed is ordinary truck-load and less truck-load service in ordinary van-type trailers. Similar service is provided by protestant common carriers. Upon an examination of the facts and a carefully detailed analysis thereof, the Commission concluded that the service proposed at least in all reasonable aspects could be provided by existing carriers. For the court below upon the same record to conclude that the supporting shippers require a special service not provided by common carriers is, these appellants assert, to substitute its judgment for that of the Commission. For the Commission to discharge its heavy responsibilities imposed by Congress in the development and regulation of our national transportation system it must continue to have and to exercise a wide discretion as previously recognized by this Court.

## ARGUMENT

### I.

#### **Adequacy Of Existing Service Must Be Considered By The Commission In Determining Whether A Proposed Contract Carrier Service Would Be Consistent With The Public Interest And The National Transportation Policy.**

In reversing the decision of the Interstate Commerce Commission the court below places principal reliance upon the decision of the District Court in *J-T Transport Co., Inc. v. United States and Interstate Commerce Commission*, 185 F. Supp. 838 (W. D. Mo., 1960). Both courts erred in holding that the Commission, in considering an application for a contract carrier permit, may not consider whether existing motor carrier service is adequate to meet the reasonable transportation needs of the supporting shipper or shippers. Accordingly, both the case at bar

and the *J-T Transport* case which is before this Court in Nos. 17 and 18, October Term 1961, raise identical issues with respect to the interpretation to be given § 209(b) of the Interstate Commerce Act, as amended (49 U.S.C. 309(b)). The Regular Common Carrier Conference, one of the appellants herein, has argued these issues, *in extenso*, in its brief in the *J-T Transport* case, filed concurrently herewith in No. 18, October Term, 1961. In the interest of avoiding undue repetition, these appellants specifically adopt that argument which, for convenience, is set forth verbatim in Appendix B attached hereto.

## II.

### Lower Rates Proffered By Contract Carrier Applicant Not Relevant In Plea For Operating Rights

Rate Levels Not Properly at Issue in Section 209 Proceedings

The lower court, condemning the Commission's treatment of the effect of a denial of a permit upon applicant's supporting shippers, said (188 F. Supp. at 167, R. 409):

" \* \* \* Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. \* \* \* "

At the outset we urge that rate levels are not properly at issue in a proceeding where new operating rights are sought. This has been the traditional and generally

approved policy of the Commission.<sup>5</sup> Speaking of the expressed attitude of the shippers in the case before it, the Commission said (81 M.C.C. at 42, R. 395):

“ . . . the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. . . . ”

Reasonableness of a rate level is a subject not embraced within § 209, and relief from unreasonable common carrier rates may be sought under either § 204(c) or 216(d) of the Act. 49 U.S.C.A. §§ 304(c) and 316(d).

In *Omaha & C. B. Ry. Bridge Co. Com. Car Application*, 52 M.C.C. 207, 235 (1950), a protestant transit company in opposing a grant urged that the applicant, if successful, would later increase passenger rates to the public. The Commission, rejecting that view, said:

“ We have consistently refused to consider the issue of rates as pertinent in proceedings of this nature, since that is a matter for which other provisions of the act provide a remedy. . . . ”

*Pomprowitz Extension—Packing House Products*, 51 M.C.C. 343 (1950), involves a contract carrier applicant that sought either a broadened interpretation of operating rights or an extension of authority. Denying the authority, and observing that the evidence adduced did not establish that the needs of supporting shippers cannot

<sup>5</sup> *American Trucking Asso. v. United States*, 326 U.S. 77, 86 (1945); *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 91-92 (1957); *Railway Express Agency v. United States*, 153 F. Supp. 738, 741 (S.D. N.Y. 1957).

be met by existing carriers, the Commission concluded (p. 350):

“ \* \* \* To the contrary, it strongly suggests the conclusion that their support of the application is based upon the element of rates rather than service and that, of course, is not a proper predicate for a finding that the proposed service would be consistent with the public interest and national transportation policy. \* \* \* ”

In *Black Extension of Operations—Prefabricated Houses*, 48 M.C.C. 695 (1948), a supporting shipper urged expanded contract rights for an applicant, advancing the high rates of common carriers as a reason therefor. Denying the authority, the Commission said (p. 709):

“ \* \* \* If the rates of the authorized carriers are too high, section 216 of the Interstate Commerce Act provides an appropriate remedy. We conclude that this application should be denied.”

The proper area for consideration of rate levels in operating authority cases was described by this Court in *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 92 (1957). There, distinguishing decisions, except one, where the contending parties were carriers of the same mode and operating in the same territory, the Court said:

“ \* \* \* Those decisions are entirely different from the situation presented here, where a motor carrier seeks to compete for traffic now handled exclusively by rail service. In these circumstances a rate benefit attributable to differences between the two modes of transportation is an ‘inherent advantage’ of the competing type of carrier and cannot be ignored by the Commission.”

Two important facts distinguish *Schaffer* from the case at bar. First, the controversy involved motor versus rail service. Second, and of even greater significance, the “inherent advantage” in the *Schaffer* case was the ability

of one of the two types of carriers to operate more cheaply than the other. In the case at bar there is no evidence whatever to indicate that Reddish can operate more cheaply than existing carriers. Accordingly, there is no warrant for the conclusion of the district court that the low rate level maintained by Reddish must be considered by the Commission as an inherent advantage.

**There Was No  
Evidence From  
Which Economies  
And Efficiencies  
Could Be Found**

The lower court held, as detailed earlier herein, that the Commission may not disregard evidence of lower rates produced by economies and advantages in a proposed contract carrier operation. It said (188 F. Supp. 167, R. 409):

“ . . . Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance . . . the Commission may not disregard this evidence . . . ”

Examination discloses that the record contains no evidence of economies and advantages productive of low contract carrier rates. The only cost or financial statement produced was a balance sheet of applicant dated March 31, 1958, some two and one-half months prior to the institution of operations by Reddish under temporary authority (R. 46, 58). All of applicant's income prior to June 13, 1958, was derived from the business of leasing vehicles and none from operations as a for-hire carrier (R. 71). Therefore, that evidence is not relevant to Reddish's operating costs as a carrier and there is no other evidence dealing with such costs. In the absence of any evidence supporting it the holding of the court below should be reversed. *State of New York v. U. S.*, 257 U.S. 591 (1922).

The decision of the court below necessarily implies a comparison of operating costs encountered or reasonably expected by Reddish with those encountered by protesting motor common carriers. Protestants entered no evidence

of their operating costs, nor did Reddish. Thus there are neither contract carrier costs of record nor common carrier costs of record and the court below, in finding as a fact that the lower rates proffered by Reddish resulted from economies of the contract carrier, made an assumption wholly unwarranted by the record.

**Decision Below  
Invites Predatory  
Practices Violative  
Of Act**

The rule of law stated by the district court in this case is in direct conflict with long-established Commission policy and forces the Commission to open the door to one of the most destructive practices known to for-hire carriers. Under the view of the district court, prospective motor carriers seeking to enter the field of regulated for-hire carriage, and carriers seeking expansion, would be allowed to indulge in destructive competitive practices in that the mere maintenance by them of low rate levels would, in and of itself, constitute justification for the issuance of new operating authority. Thereby, existing motor carriers would be utterly defenseless in trying to protect their economic health and the value of their operating rights. See *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748 (1953), aff'd. 121 F. Supp. 277 (1954). Moreover, such a view is in direct conflict with the mandate of the National Transportation Policy which requires the Commission to prohibit unfair and destructive competitive practices. The court's view would seriously curtail the broad range of discretion granted to the Commission by Congress and, as to contract carrier permits, would transform the Commission into a ministerial body for the purpose of issuing new rights. The rule laid down by the district court undermines the effectiveness of the Commission's power to promote sound and stable transportation by requiring the creation of new operating authority on the basis of proffered rates alone without any showing of an ability to operate profitably at such rates. Thereby it permits the institution of a new competitive service which may

well destroy itself, but, more importantly, may destroy the existing motor carriers and weaken the national transportation system.

The court below attempts to avoid this result by the following language (188 F. Supp. at 167, R. 409):

“ . . . Mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded.”

As pointed out earlier herein, there is no evidence in the record before the Commission of efficient operation by Reddish. The compensatory nature of the proffered rates and the degree of operating efficiency cannot be ascertained when no actual operating costs were presented to the Commission. The existing motor carriers should not be required to defend their service and their rates against excessive competition and predatory practices on the basis of pure speculation. Such a requirement is not conducive to the maintenance of a sound transportation system.

The policy of protecting existing carriers and carrier facilities urged by these appellants has, since 1920, been the policy of Congress, and recognized by this Court. With the enactment of the Transportation Act of 1920, 41 Stat. 474, Congress established a new policy. Speaking of that Act in *Dayton-Goose Creek R. Co. v. United States*, 263 U.S. 456, 478 (1924), this Court said:

“ . . . The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construc-



tion of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intra-state commerce, to secure a fair return upon the properties of the carriers engaged."

The philosophy expressed by this Court in *Dayton-Goose Creek* was expressed by it with respect to motor carriers in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). After noting (p. 81) that the Transportation Act of 1920 marked a sharp change in Congressional regulation of transportation, the Court made this observation (p. 83):

" . . . . The premises of motor carrier regulation posit some curtailment of free and unrestrained competition. The origins and legislative history of the Motor Carrier Act adequately disclose that in it Congress recognized there may be occasions when 'competition between carriers may result in harm to the public as well as in benefit; and that when a (carrier) inflicts injury upon its rival, it may be the public which ultimately bears the loss.' Cf. *Texas & P. R. Co. v. Gulf C. & S.F. R. Co.*, 270 U.S. 266, 277, 70 L. ed 578, 583, 46 S Ct 263."

Entry into the field of regulated for-hire transportation, the establishment of new carrier service upon the basis of lower rates unsupported by cost figures is a destructive, predatory policy not countenanced by the Act and contrary to Congressional policy as interpreted by this Court.

### III.

#### **The Record Fails To Disclose A Distinct Need of Supporting Shippers Which Would Not Be Met By Protesting Motor Common Carriers**

In concluding that the Commission had erred in denying the authority sought, the court below said (188 F. Supp. at 167, R. 410):

"Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier. As the Court said in the *J-T Transport* case:

"... a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's "*reasonable transportation needs*", that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper."

It must be kept clearly in mind that § 203(a)(15) is simply the definition of the term "contract carrier" which includes therein one who provides "transportation services designed to meet the distinct need of each individual customer." A similar provision is included in § 209(b) where the Commission is required to consider the nature of the service proposed. The Commission found that Reddish affirmatively met the definitional requirement of § 203(a)(15) (R. 393). Thereafter, in applying § 209(b) it found that the distinct needs of the three shippers could be adequately met by existing carriers. In reaching its conclusion, rejected by the court below, the Commission said (81 M.C.C. at 41, R. 393):

"The next factor, the nature of the proposed service, requires a determination of whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. Shippers require a motor-carrier service for the transportation of less-than-truckload shipments of canned goods, providing multiple pickups and deliveries. Protested carriers are authorized to serve the origin points involved and, either directly

or through interchange, numerous points in the vast 33-State destination territory in which applicant desires to operate. They are willing to make multiple pickups and they offer stop-off-in-transit delivery service. The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. This appears to be a situation in which the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant. In fact, shippers assert that they would continue to use common-carrier service on truckload shipments even if the application is granted."

The foregoing quotation demonstrates that in arriving at its conclusion the Commission compared the services proposed by applicant with those rendered by protestants and common carriers generally. Moreover, the Examiner in his report (R. 365-384) summarized the facts. The Commission, referring to that report said, (81 M.C.C. at 37, R. 388):

" . . . The examiner's statement of facts is correct in all material respects, and we adopt it as our own. The facts are repeated only insofar as is necessary for discussion of the issues."

Significant attention is paid by the Commission to the facts respecting protestants' evidence and services, in the following language (81 M.C.C. at 39-40, R. 391-392):

"A number of motor-carrier protestants presented evidence of their authorities and operations. These are discussed in detail in the examiner's report and need not be repeated here. By either direct or joint-line service motor protestants can provide service to substantially all the points involved herein. Each of the opposing motor carriers, except Nelson Brothers, is a common carrier, and each operates a substantial amount of equipment suitable for the transportation of the commodities here involved. Although shippers have knowledge of the availability of service from several protestants, none of the protestants have par-

participated in the involved traffic. All have expressed an interest in participating in this traffic either as initial or connecting carriers on both inbound and outbound shipments. They have handled both large and small shipments of the type of traffic here involved and are willing to provide multiple pickup and delivery where authorized. \* \* \*

The foregoing recitation demonstrates the error of the court below in concluding that "no consideration was given to the special services which could not be supplied by a common carrier." (R. 410)

It is important to note that Reddish does not propose to dedicate his equipment to the exclusive use of any particular shipper, one test of specialization under the definition in § 203(a)(15). His trucks will collectively be used to transport the traffic of all three shippers and in addition will transport for any one commodities otherwise exempt from regulation by the Commission (R. 88, 107, 112). It thus becomes difficult to discover the "special services" to be rendered by Reddish and not rendered by common carriers.

Reliance by the court below for its conclusion that "special services" are not provided by protestants apparently stems from the Commission's statement (S1 M.C.C. at 42, R. 394) that:

"\* \* \* In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application."

Use of the term "reasonable transportation needs" followed careful weighing of complaints which were found by the Commission to be of a "general nature, and [which] are not substantiated by reference to specific instances." (R. 394). Moreover, as to quality and flexibility of protestants' service the Commission said, "the supporting

shippers have failed to show that they have been unable to obtain reasonably adequate service upon request." (R. 394) In fact, with one exception the existing service "has been almost completely untried in recent years". (R. 394) In the same paragraph of its report the Commission considered evidence of service on inbound shipments, saying "As for inbound shipments, shippers admit that there is no defect in existing service and that they support the application in this respect merely to enable applicant to conduct a balanced operation." (R. 394)

The only other type of shipment is in truckload movement, outbound. The Commission found that the shippers made no complaint on outbound truckload service, and that at least joint-line truckload service of existing carriers will be used in the future (R. 390, 391).

It is quite logical, then, these appellants believe, for the Commission, after reviewing the evidence, and commenting upon it, as just related, to conclude that present service is adequate for "reasonable transportation needs." This language is prudent and realistic and wisely admits the possibility that unusual or capricious demands of a shipper might not be met by the type and quantum of existing service available.

That a shipper's adamant position is not determinative of proper Commission action in licensing proceedings has been noted by this Court in *American Trucking Associations v. United States*, 364 U.S. 1, 18 (1960) where it said:

" \* \* \* And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. \* \* \* "

Clearly, the judgment of the Commission as to the distinct transportation requirements of the supporting ship-

pers, i.e., their reasonable transportation needs, is supported by substantial evidence of record. Similarly, the finding by the Commission that existing carriers could meet those distinct needs—is supported by substantial evidence. Accordingly, it was error for the court below to substitute its judgment for that of the Commission with respect to these material questions of fact.

Finally, these appellants urge that in the area of law here embraced the regulatory agency possesses wide discretion. This Court has repeatedly observed that the Commission possesses a wide range of discretionary authority in determining whether the public interest warrants certification of any particular proposed service. *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946); *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945); *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945).

The principle expressed by the Court is not less applicable, we think, merely because the cases cited relate primarily to common carriers. To confine narrowly the Commission's discretionary authority in resolving transportation issues arising under concepts of the public interest and the National Transportation Policy, as does the court below, would be effectively to substitute the judgment of the court for that of the Commission.

**CONCLUSION**

These appellants respectfully pray this Honorable Court to reverse the judgment of the court below and to remand the case with instructions to dismiss the complaint.

Respectfully submitted,

**JOHN S. FESSENDEN**

**ROLAND RICE**

618 Perpetual Bldg.

1111 E Street, N. W.

Washington 4, D. C.

**ROLLO E. KIDWELL**

**HUGH T. MATTHEWS**

2130 Fidelity Union Tower

Dallas 1, Texas

**J. W. DURDEN**

**THOMAS HARPER**

Kelly Building

P. O. Box 298

Ft. Smith, Arkansas

*Attorneys for Appellants*

September 1, 1961



**APPENDIX A****NATIONAL TRANSPORTATION POLICY**

"[September 18, 1940.] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

**DEFINITIONS**

Section 203(a)(15) (49 U.S.C. 303(a)(15))—

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehi-

cles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

## PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLES.

Section 209(b) (49 U.S.C. 309(b))—

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of

issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions, and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions, or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

#### RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

##### Section 216(b) (49 U.S.C. 316(b))—

“(b) It shall be the duty of every common carrier of property by motor vehicle to promote safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner

and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce."

**Section 216(d) (49 U.S.C.316(d))—**

"(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

**SCHEDULES OF CONTRACT CARRIERS BY  
MOTOR VEHICLE**

**Section 218(b) (49 U.S.C. 318(b))—**

"(b) Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle,

or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this part, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this part, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in this Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath."

## APPENDIX B

**ARGUMENT DEALING WITH CONSIDERATION OF ADEQUACY OF EXISTING SERVICE BY THE INTER-STATE COMMERCE COMMISSION IN DETERMINING WHETHER A CONTRACT CARRIER SERVICE WOULD BE CONSISTENT WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY**

Set forth below is a reproduction of that portion of the argument made by the Regular Common Carrier Conference, one of the appellants herein, in its brief in *U.S.A.C. Transport, Inc., Common Carrier Conference—Irregular Route, of the American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc. v. J-T Transport Company, Et Al.*, October Term, 1961, No. 18, filed concurrently herewith which deals with issues common to both the case at bar and the *J-T Transport* case.

**ARGUMENT**

**A. Consideration of Adequacy of Existing Service Not Only Permissible, But Required**

**Public Interest  
Contemplates  
Consideration  
of Adequacy**

Essentially, the instant controversy involves a dispute as to whether the Interstate Commerce Commission in denying a request for contract carrier authority has exceeded its discretionary powers as delineated by the legislative standard laid down by Congress for application in such matters. Stated more specifically, may the Commission within that standard [consistency with the public interest and the National Transportation Policy) consider the adequacy of existing motor carrier service. In resolving the issue, it is helpful at the

outset to recall the broad range of discretion recognized by this Court to be lodged in administrative agencies.

It is well settled that the term "public interest" standing alone is in itself sufficient as a legislative standard. *Arent v. United States*, 266 U.S. 127 (1924); *United States v. Chemical Foundation*, 272 U.S. 1 (1926). Although arising under §5 of the Interstate Commerce Act, the Court's decision in *New York Central S. Corp. v. United States*, 287 U.S. 12 (1932), contains a revealing discussion of the meaning of the term "public interest." There it stated that:

" \* \* \* The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but *has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, *the question is not essentially different* from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and *to the issue of certificates of public convenience and necessity.*" [287 U.S. 25] (Emphasis supplied)

It was also recognized that by use of the aforementioned standard:

" \* \* \* The question whether the acquisition of control in the case of competing carriers will aid in *preventing an injurious waste* and in securing more efficient transportation service *is thus committed to the judgment of the administrative agency upon the facts developed in the particular case.*" [287 U.S. 26] (Emphasis supplied)

The term "public interest" not only is irrevocably associated with considerations of adequacy of service, but,



as well, the area of permissible inquiry by the administrative agency seeking to measure the "public interest" is recognized as broad.

**Broad  
Interpretation  
Under Other  
Statutes**

One of the landmark cases in this general field is *Federal Power Comm. v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944). There Congress had provided that certain natural gas rates regulated by the Federal Power Commission should be "just and reasonable", but no express formula was provided for reaching the required determination. It was held that the Commission was not bound to any formula or combination of formulae in order to comply with the legislative standard [320 U.S. 602]. It is the result reached, not the method employed which is controlling. This Court there held that, " . . . the product of expert judgment . . . carries a presumption of validity." [320 U.S. 602].

In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the legislative standard laid down by Congress to guide the Federal Communications Commission in the exercise of its licensing power was the "public convenience, interest or necessity," certain specific criteria being set forth in § 307(b) of the Communications Act [47 U.S.C. 307(b)]. The standard of "public interest" was found not to be vague [319 U.S. 225-226] and despite the specific criteria wide discretion was recognized to have been placed in the administrative agency through the legislative standard adopted by Congress.

Even in *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86 (1953), wherein a decision of the F.C.C. was overturned, wide latitude was recognized in the hands of the administrative agency when applied within the sphere of its own expertise. There, where the agency sought to license one of two competitors on the ground that it was national policy to

encourage competition, the Court in rejecting the agency action nevertheless stated that the result reached would have been valid, "[h]ad the Commission clearly indicated that it relied *on its own evaluation of the needs of the industry* rather than upon what it determined a national policy . . . ." [346 U.S. 94] (Emphasis supplied) It was found that competition might be allowed, whenever *the Commission* finds "that tangible benefit to the public would be derived from the authorization" [346 U.S. 89], but " . . . the Commission must at least warrant, as it were, that competition would serve some beneficial purposes such as maintaining good service and improving it." [346 U.S. 96-97].

**Consideration  
Permissible  
Under Legislative  
Standard**

It is clear from the foregoing that where broad legislative standards are laid down by Congress to guide an administrative agency in the exercise of its functions, the agency may consider and give weight to factors or elements reasonably embraced within that standard. What is appropriate may well vary from case to case. But so long as the factors or elements considered are consistent with the standard and with the purpose and policy of the act administered, and do not fall into areas outside the expertise of the agency, any material and relevant factor developed of record will not be found to be inappropriate. In short, the range of administrative discretion is broad. That of the Interstate Commerce Commission is no exception.

In *Interstate Commerce Commission v. Parker*, 326 U.S. 60 (1945), the Commission's action in granting a certificate of "public convenience and necessity"<sup>1</sup> to a rail

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<sup>1</sup> With respect to the scope of administrative discretion, there is no difference in approach based upon whether a standard is laid down in terms of "public convenience and necessity" or "consistency with the public interest." Indeed, in *American Trucking Associations v. United States*, 355 U.S. 141, 149-150 (1957) it was

affiliate was under attack. There the Court said that:

" \* \* \* The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell v. United States*, 300 US 276, 287, 81 L ed 643, 651, 57 S Ct 470. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co. v. United States*, 321 US 67, 87, 88, 88 L ed 544, 556, 557, 64 S Ct 370, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. \* \* \* " [326 U.S. 65]

Referring to the National Transportation Policy and the broad generalizations contained therein, the Court said:

" \* \* \* In such situations, the solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress." [326 U.S. 66]

It was further stated that the Commission:

" \* \* \* is in a position to determine by its administrative discretion whether the projected service may be better rendered by the railroad or existing motor carriers. \* \* \* " [326 U.S. 72-73]

**Consideration  
Required by  
National  
Transportation  
Policy**

Moreover, in a concurrent decision, *American Trucking Assn. v. United States*, 326 U.S. 77 (1945), the interest of the public was specifically tied to consideration of the effect of the proposal upon other carriers. In finding that, " \* \* \* the Commission should have admitted evidence of the flow of traffic by

expressly recognized that where within the "public interest" under § 5 of the Act a railroad might obtain control of a motor carrier operation only if such operation could be used to benefit in the railroad operation, the policy thereby expressed would generally be applied as well in matters arising under § 207 of the Act where the legislative standard involved "public convenience and necessity." See also *American Trucking Assn. v. U. S., et al.*, 364 U.S. 1, 7 (1960).

truck . . .", the Court stated that the problem of whether to grant a certificate to rail subsidiaries could be solved only after receipt of evidence as to the probable effect of the proposal on protesting motor carriers [326 U.S. 85, 86].

It is fair to conclude that while, on the one hand, there rests in the Commission wide latitude in the selection of factors or elements to which it may give weight, its administration of the Act, on the other hand, must always be accomplished with full regard to the National Transportation Policy. In *Schaffer Transportation Co. v. United States*, 355 U.S. 83 (1957), the Court stated that:

"The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured . . . [pages 87-88]

. . . .  
 " . . . since the findings . . . do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said." (page 92)

See also *American Trucking Assos. v. United States, et al.*, 364 U.S. 1, 11 (1960); *Eastern-Central M. C. Assoc. v. United States*, 321 U.S. 194, 206 (1944); *American Trucking Assos v. United States*, 355 U.S. 141, 152 (1957).

The district court's decision, is thus framed by this situation: (a) On the one hand, the Commission is accorded great latitude in considering factors which shed light on the public's interest, here exercised by considering the adequacy of service offered by existing carriers; and (b) on the other hand, Congress actually required such consideration in view of its mandate that the Com-

mission, " . . . promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers . . . ." Such service and such conditions are not promoted or fostered by licensing new carrier operations to perform a service which could be adequately rendered by existing carriers.

#### Recent Court Decisions

Several Court decisions issued since August 22, 1957, bear upon propriety of the Commission's grant or denial of contract carrier applications. The most illuminating is that of this Court in *American Trucking Assos. v. United States, et al.*, 364 U.S. 1 (1960). There the Commission's grant of a permit to a rail-controlled motor carrier was successfully attacked. It was found that the Commission's decision had failed to take into consideration general policy firmly intrenched in the law and implemented through a series of Commission decisions into a set of reasonably concrete standards [364 U.S. 7]. This Court once again commanded<sup>2</sup> that the Commission *must* take cognizance of the National Transportation Policy and apply the Act "as a whole." [364 U.S. 11]. The District Court in the instant case denied the Commission the power to do just that.

Moreover, in the *American Trucking* case, specific comment was made that the policy of the act does not allow issuance of a permit simply because a shipper wants a contract carrier service [364 U.S. 15]. These appellants submit that the supporting shipper here evidenced nothing stronger than such a desire, as distinguished from an actual need.

It seems clear that the *American Trucking* case negates the theory advanced by appellees and accepted by the

<sup>2</sup> Specific acknowledgment was made of the 1957 amendments, see 364 U.S. 13, footnote 9.

district court that the 1957 amendments severed § 209 (b) from any connection with criteria, tests or standards developed and applied in precedent cases arising prior thereto. This Court has reaffirmed the command to the Commission that it must take full cognizance of the National Transportation Policy and apply the Act "as a whole"—not confined exclusively to the narrow limits of the criteria added to § 209(b).

Similarly, in *Bass v. United States*, 163 F. Supp. 1, 3 (W. D. Va. 1958), aff'd 358 U.S. 333, rehearing denied 359 U.S. 956, a contract carrier applicant had been denied authority to perform a charter service which common carriers of passengers were already authorized to perform. There the court stated that:

" . . . However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that, even though a particular type of charter service is made adequately available by common carriers, the Commission must nevertheless authorize duplicate service, whenever the same is tendered, by contract carriers who are not common carriers. In other words, we do not believe that Congress, in laying down its national policy, meant that, notwithstanding the existence of adequate contract charter service by common carriers, the Commission is still compelled to allow duplicate facilities by one who offers contract service exclusively.

"We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interests and the national transportation policy."

It is clear from the above that the court relied on the validity of the adequacy doctrine in upholding the decision of the Commission.



A similar case arose in the United States District Court for the Eastern District of Virginia, Civil Action No. 2023, *Alexandria, Barcroft & Washington Transit Company and Washington, Virginia and Maryland Coach Company, et al. v. United States of America and Interstate Commerce Commission*, July 10, 1961. There, plaintiff common carriers contended that the Commission had erred in granting a contract carrier permit to perform charter passenger service because it did so in the mistaken belief that, as a matter of law, plaintiff common carriers could not provide the service required by the customer [The United States Government]. In upholding the plaintiff's view of the case, the District Court,<sup>3</sup> by decision dated July 10, 1961, observed as follows:

"The upshot of the statutory definitions and the transportation policies, noted earlier, is that contract carriage can exist only in circumstances where adequate common carriage is not found. With no issue of adequacy in the case, the plaintiffs must be accorded the opportunity to furnish the Government service, the contract carrier denied it."

#### **B. Amendment To Section 209(b) Did Not Exclude Adequacy Of Existing Service**

**Section 209(b)  
is Clear And  
Unambiguous**

The validity of the adequacy of existing service doctrine as applied in appropriate cases has never, to the knowledge of these appellants, been successfully challenged.

It had become an accepted part of our transportation law long before August 22, 1957. Congress must be presumed to have known of this application of the standard of consistency with the public interest and the National Transportation Policy. The question then is whether the amendments to §§ 203(a)(15) or 209(b) taken singly or in combination so changed that law as to exclude appli-

<sup>3</sup> SOBELOFF, Chief Circuit Judge, HAYNESWORTH, Circuit Judge, and BRYAN, District Judge.



cation of the adequacy doctrine in contract carrier application cases.

The legislative standard set forth in § 209(b), as amended, is as follows:

“ \* \* \* Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. \* \* \* ”

It is the belief of these appellants that the statutory provision set forth above is clear and unambiguous and “is the best expositor of itself.”<sup>4</sup> Thereby, there can be no need to inquire into the legislative history of the amendment for it is well settled that legislative history may not be used to vary the plain meaning of an act.<sup>5</sup>

The term “public interest” and the National Transportation Policy are both well understood. Therefore, as

<sup>4</sup> *Pennington v. Coze*, 6 U.S. 33, 2 Cranch 33, 52 (1804).

<sup>5</sup> *United States v. Missouri P. R. Co.*, 278 U.S. 269, 278 (1929).

those terms are used in § 209(b) they are to be applied according to their plain and accepted meaning and resort may not properly be had to legislative history for the purpose of drawing inferences which are at odds with that plain meaning. See, *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *Packard Motor C. v. National Labor Relations Board*, 339 U.S. 485 (1947); *Morissette v. United States*, 342 U.S. 246, 263 (1952); and *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 65 (1953).<sup>6</sup>

The basic standard governing contract carrier applications set forth in § 209(b), as before, is whether the proposal will be "consistent with the public interest and the National Transportation Policy." The effect of the decision of the district court is literally to read out of § 209(b) the mandate of the National Transportation Policy even though that policy is an explicit part of the basic statutory standard. This constitutes a change in the law which only Congress has the power to accomplish.

In a number of cases this court has insisted that the Commission constantly approach regulation under the Act with scrupulous attention to the dictates of the Na-

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<sup>6</sup> And see *Gemsco v. Walling*, 324 U.S. 244, 260 (1945) where this Court said:

"This argument from the legislative history undertakes, in effect, to contradict the terms of § 8(f) by negative inferences drawn from inconclusive events occurring in the course of consideration of the various and widely differing bills which finally, by compromise and adjustment between the two Houses of Congress, emerged from the conference as the Act. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. \* \* \*

tional Transportation Policy.<sup>7</sup> Yet, the district court held that in specifying five or six criteria to be considered in determining consistency with the public interest and the National Transportation Policy Congress precluded consideration of any other elements regardless of the mandate of the policy to administer and enforce the Act in light of its objectives. In substance, then, the district court held that the specific criteria set forth in § 209(b) constitute the entire scope of the public interest and the National Transportation Policy insofar as contract carrier applications are concerned. These appellants submit that so sweeping a change through the device of statutory construction may not properly be permitted. It is contrary to reason to assume that Congress would sharply curtail the scope of the National Transportation Policy in proceedings under § 209(b) while leaving it unchanged with respect to every other section of the Interstate Commerce Act. Accordingly, the District Court erred in holding that the Commission may not consider the adequacy of existing carrier service in determining whether or not a contract carrier application would be "consistent with the public interest and the National Transportation Policy."

**Prescribed  
Criteria Require  
Consideration Of  
Existing Service**

At this juncture it must be pointed out that the district court in holding that the Commission may no longer consider adequacy of existing service necessarily assumed that in the case at bar the Commission held that merely because common carrier service was available no contract carrier service would be authorized. This is not an accurate appraisal of the Commission's decision. The Commission specifically found that the applicant's proposal constituted contract car-

<sup>7</sup> See *Schaffer Transportation Co. v. United States*, 355 U.S. 83 (1957), and *American Trucking Assos. v. United States*, 364 U.S. 1 (1960).

riage (79 M.C.C. 706, R. 44-45). Then, in applying the public interest standard of § 209(b), including the specified criteria, the Commission found that the reasonable transportation needs of the shipper could be adequately met by the available service of existing common carriers and did not require the service proposed by the applicant. Thus, it is not the mere availability of common carrier service that warranted denial of the application, but rather it was the fact that the shipper's reasonable transportation requirements could be adequately met by such available service.

When the case is reviewed in proper perspective it becomes clear that adequacy of available service is necessarily included in at least two, and perhaps three of the criteria specified in § 209(b). Stated in simplified form the criteria are:

- (1) The number of shippers to be served,
- (2) The nature of the service proposed,
- (3) The effect which granting the permit would have upon the service of protesting carriers,
- (4) The effect which denying the permit would have (a) upon the applicant, and/or (b) upon the shipper, and
- (5) The changing character of the shipper's requirements.

With respect to the second criterion "nature of service proposed," it is apparent that in order to consider the nature of the proposed service in relation to the public interest and the National Transportation Policy, consideration must be given to the shipper's transportation requirements and the nature of the available transportation service. To do otherwise would be to attempt to determine the public interest in a vacuum.

The third of the prescribed criteria is that the Commission shall consider the effect of granting a permit

upon protesting carriers. Plainly, because all of the criteria are set forth simply as considerations to be made by the Commission in determining consistency with the public interest and the National Transportation Policy, the evaluation by the Commission of the effect upon protesting carriers must be in terms of the public interest and the Policy. Therefore, such consideration must of necessity include an evaluation of the shipper's transportation requirements and the adequacy in light of those requirements of the available service of protesting carriers. To fail to so evaluate the effect upon protesting carriers of a grant of a permit would render this criterion substantially meaningless. Indeed, the very inclusion of this criterion in the 1957 amendments to § 209(b) is indicative of Congressional approval of the long line of Commission decisions holding that existing carriers are entitled to an opportunity to transport all traffic which they can handle adequately and efficiently before new operations will be authorized.

If the Commission, in summary fashion, granted all contract carrier applications without considering whether the service for which authority is sought is actually provided by or available from existing common carriers, as the district court would apparently have it do, the granting of each such permit would be an effective removal of actual or potential traffic from the common carrier system. Moreover, if existing common carrier service is eliminated from the Commission's considerations, the inevitable result can only be summary approval and issuance of such permits. At each industrial facility, at each commercial house, contract carriers could obtain new authority on the theory that the existence of adequate common carrier service does not negative the creation of a new and competitive contract carrier service. The result could only be an administration of the Interstate Commerce Act precisely contrary to the basic motives and

purposes underlying the passage of that Act and clearly stated in the National Transportation Policy. If the Commission is required to permit the persistent whittling away of common carrier traffic, actual or potential, through the granting of contract carrier permits regardless of the availability of common carriers to serve the same shippers, that agency could not possibly discharge its duty to foster sound economic conditions in transportation.

Neither under the Interstate Commerce Act as amended in 1935 (49 Stat. 543) nor under the 1957 amendments to the contract carrier provisions thereof, does there appear language warranting the pyramiding of new authority so as to jeopardize carriers already authorized by the Commission. The very passage of the law requiring government licensing before new for-hire operations in interstate or foreign commerce may be instituted is in itself persuasive that the economic health of presently certificated or permitted motor carriers is important to the nation. That idea finds specific expression in the National Transportation Policy.

Our fluid and dynamic economy constantly changes the location of factories and plants. Construction of a new plant here often means the closing there of a plant long served. New commodities, new products constantly replace the old and familiar. Potential traffic thus becomes as important as traffic presently enjoyed. Today's potential becomes tomorrow's reality. The considered traffic may be academically "potential" to U.S.A.C., but since its imbalance of traffic causes it to "deadhead" its vehicles empty westbound from the origin terminal Indianapolis (R. 116), the failure to be accorded an opportunity to transport the considered traffic is altogether present and real.

As the Commission said in *Smith & Solomon Trucking Co., Extension—Camden, N. J.*, 61 M.C.C. 748, 752-753 (1953):

"A certificate is a legal privilege. Unless we protect it, we destroy its value. We cannot expect motor carriers to carry out their obligations if we create situations which subvert their efforts to render adequate and efficient service." (Aff'd.—*Smith & Solomon Trucking Co. v. U. S.*, 120 F. Supp. 277 (1954).

Never has such a narrow and shortsighted view as that adopted by the court below been countenanced by the Commission or the courts. Indeed, the Act must be construed with due regard to its purpose.<sup>8</sup> Particular portions of an act should not be read *in vacuo*, but should be considered as a part of the whole with due regard to the overall purpose.<sup>9</sup>

Finally, the fourth criterion, i.e., the effect which denying a permit would have upon the shipper, also requires consideration by the Commission of the adequacy of service already available to the shipper. Thus, where the facts reveal the availability to a shipper of an existing motor carrier service which can adequately meet the shipper's reasonable requirements it is fair to conclude that a denial of a permit would not materially affect the shipper. On the other hand, if the facts revealed that an existing service could not meet the shipper's reasonable requirements the fair conclusion would be that a denial of a permit would materially and adversely affect the shipper. But, if the Commission is forbidden to evaluate the quality of service available to a shipper how can it make any meaningful determination of the effect upon that shipper of the denial of a contract carrier permit?

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<sup>8</sup> *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 492 (1939); *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

<sup>9</sup> *Koppersa Conn. C. Co. v. Jas. W. B. Line*, 89 F. 2d 865 (1937).



Pursuant to § 209(b), as amended, and particularly its plain requirement that the grant or denial of a contract carrier permit rest upon the Commission's determination of consistency with the public interest and the National Transportation Policy, it is manifest that where a proposed contract carrier service is of a type or character consistent with common carriage, those carriers currently in a position to serve a shipper should be given an opportunity to do so. Where common carrier service is shown to be available and suited to the reasonable transportation needs of the shipper a prerequisite to approval of a contract carrier application is that the available service was tried and found wanting. Nor may the required actual or potential loss of traffic, as a test of the effect on protesting carriers, be so great in any single case as to cripple the existing service. For to so hold would be to allow such crippling effect, ignoring each individual case on the theory that no one blow is fatal. Yet, in the aggregate the result could only be a weakening of the national transportation system in direct contravention of the Congressional mandate as set forth in the National Transportation Policy.

**National  
Transportation  
Policy Includes  
Adequacy**

Moreover, in addition to the foregoing, the factor of adequacy of existing carrier service is also clearly found in the National Transportation Policy itself.

This Congressional declaration demands that the Commission " . . . promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . . ." Even prior to the adoption of the policy in its present form<sup>10</sup> the Commission equated the proposition stated above with adequacy of service. In *Podolsky*

<sup>10</sup> Prior to adoption of the National Transportation Policy in 1940 very similar language appeared in § 202(a) of the Act, 49 U.S.C. § 302(a), 49 Stat. 543.

*Contract Carrier Application*, 2 M.C.C. 653, 654 (1937), it was stated:

" . . . In the consideration of contract-carrier applications we have frequently said that, *in order to foster sound economic conditions*" in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them." (Emphasis added)

Clearly, where it is established that existing carriers are in a position to provide a required service the quoted objectives of the Policy demand that they be afforded an opportunity to do so before a new service is created.

**C. Legislative History Demonstrates That No Change In Statutory Standard was Intended Or Accomplished**

While these appellants assert that disposition of this case can and should be made without reference to legislative history they likewise assert that an examination of that history will demonstrate that no change in the standard was intended or accomplished. This means that adequacy of existing service as a factor, embraced within the public interest and the National Transportation Policy, was not intended to be excluded by Congress in the 1957 amendments. The court below takes a contrary view (R. 167, 173).

Impetus for the 1957 amendments, was found in the decision of this Court in *United States v. Contract Steel Carriers*, 350 U.S. 409 (1956) and initiative for amending the statute was assumed by the Commission itself. In both its 69th and 70th Annual Reports, (1955 and 1956) the Commission recommended amendments dealing with

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<sup>11</sup> This language carries over to this day in the National Transportation Policy enacted after this and similar decisions, demonstrating the manner in which the adequacy doctrine is tied so closely to that Policy.

contract carriage. Insofar as is here pertinent, the Commission's original recommended amendments to §§ 203 (a)(15) and 209(b) were as follows:<sup>12</sup>

"(1) By changing paragraph (15) of section 203(a) thereof (49 U.S.C. sec. 303(a)(15)), to read as follows:

'(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers.'

. . . . .

"SEC. 2. Part II of such Act is further amended by inserting between the words 'thereunder,' and 'that' in the second sentence of section 209(b) (49 U.S.C. 309(b)), the following: 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' . . . ."

The purpose of the Commission in recommending such changes is found in the testimony of former Chairman Clarke at hearings held on the bill introduced at the instance of the Commission. There, Mr. Clarke said:<sup>13</sup>

"Under existing law, even though the initial grant of authority may have been based on a showing of need for individual specialized service, there is no assurance once a permit has been granted against a contract carrier actively competing with and supplanting common carriers by subsequently adding a large number of contracts with other shippers. In this connection the Supreme Court recently stated in *U. S. v. Contract Steel Carriers*, decided just a year

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<sup>12</sup> S. 1384, 85th Cong. 1st Ses.

<sup>13</sup> Hearings, Before A Subcommittee Of The Committee On Interstate And Foreign Commerce, U.S. Senate, 85th Cong., 1st Ses., On S. 1384 And Other Bills, pp. 23-24.

ago, that a contract carrier is free to aggressively search for new business within the limits of its license. This decision has also cast considerable doubt on the correctness of the Commission's interpretation of the act as to specialization. Freedom to solicit customers without restriction as to specialized service would tend to obliterate the distinction which Congress intended to make between common and contract carriers. The amendments proposed in the bill would enable the Commission to give greater effect to Congressional purpose, first by amending the definition of contract carrier by motor vehicle to state clearly that the transportation services furnished by such carriers are to be of a special and individual nature for one or a limited number of persons and which are not provided by common carriers.

"Two, by specifically providing in section 209 (b) that the Commission, in granting contract carrier authority, may include terms, conditions, and limitations respecting the person or persons or the number or class for which a common carrier may perform transportation services, as may be necessary to assure that the business conducted by the permit holder is that of a contract carrier and within the scope of its permit.

"Third, by removing from the proviso in section 209(b) the prohibition which prevents the Commission from limiting the number of effective contracts which a contract carrier may have under its permit. The recommended amendment to section 212 is in the nature of a grandfather clause authorizing the Commission to issue a certificate in lieu of a permit without proof of convenience and necessity, where it finds that the operations of existing permit holders do not conform to the revised definition, are those of a common carrier and are otherwise lawful."

It is obvious from the recommended language of the Commission and from the testimony of its spokesman that it sought no change in the basic legislative standard to the effect that prior to issuance of a permit the proposed operation must be shown to be "consistent with the public interest and the National Transportation Policy."

The measure encountered vigorous opposition, particularly by the Contract Carrier Conference, an appellee here. It should be observed, however, that opposition of that Conference was not directed to the Commission's stated purpose, but against the inclusion of language recommended by the Commission and which the Conference later joined by the Commission deemed unnecessary to the accomplishment of the Commission's stated purpose. Further reference to the legislative history will establish the accuracy of this analysis.

In the hearings before the Senate Subcommittee on Surface Transportation on S. 1384, the Contract Carrier Conference was represented by its General Counsel, who also represents that Conference in the instant proceeding. Certain of the statements of the witness are particularly illuminating at this juncture.

At pages 299-300 of Hearings, Before A Subcommittee of The Committee on Interstate and Foreign Commerce, U. S. Senate, on S. 1384, the Contract Carrier Conference General Counsel said:

" . . . Now, in addition, Mr. Chairman, to the suggestion that we thought would be helpful to the Commission [dealing with limitations in contract carrier permits and grandfather provisions], we had a suggestion that we thought would be helpful to the contract carriers. As I have stated before, the contract carrier must obtain a permit from the Interstate Commerce Commission. The suggestion that we have made, both before this committee and before the Commission, would limit contract carriers rather than provide for any expansion, so that we felt that section 209(b), the section of the law under which the Commission may grant a new contract-carrier permit, or the extension of a permit, if it is shown that the service proposed is consistent with the public interest and the national transportation policy.

*"We do not suggest any change in that standard. The only thing we have suggested in that connection*

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is that there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out, and I have put into my statement the exact language which we have suggested, that the primary thing that we have always felt the Commission should do in those cases is *consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration. . . .* (Emphasis added)

At page 303 of Hearings, supra, the General Counsel said:

"S. 1384 would amend section 209(b) in such a way as to make it necessary for any contract carrier seeking new or extended authority to prove that the service proposed was one that common carriers were unwilling or unable to perform. Such requirement would, for all practical purposes, put to an end any extension of contract carrier services, for in practically every instance where a contract carrier seeks either new or extended rights, opposing common carriers oppose the application alleging that they are willing and able to perform the proposed service. Since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge, it would be absolutely impossible for a contract carrier to ever prove to the contrary. Furthermore, it would be very difficult for a contract carrier or its supporting shipper, having no intimate knowledge of the business of opposing common carriers, to prove that such carriers were unable to perform a given service."

The foregoing makes clear that the Contract Carrier Conference sought no change in the standard applicable to contract carrier applications. The witness for the Conference called attention to the fact that under the then-existing standard, the Commission had always considered



the available common carrier service and urged only that *in addition* to such consideration the Commission should also be required to consider the effect of denial upon the applicant.

The Conference in that testimony objected to the more restrictive language proposed for inclusion in the definition of contract carriage and to the strict limitation that a permit should be issued only if existing common carriers were shown to be unable or unwilling to provide the service regardless of the public interest. The Commission concurred as will now be shown.

With respect to the described objectionable language proposed for amending § 209(b), former Chairman Clarke testified at pages 21-22 of Hearings, *supra*, as follows:

“ . . . As drafted, S. 1384 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point, that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Commission, upon further consideration, has voted to withdraw its recommendation to amend Section 209 (b) in this respect . . . ”

And with respect to the similar language contained in the recommended amendment to § 203(a)(15), Chairman Clarke wrote the Subcommittee under date of May 21, 1957, as follows:<sup>14</sup>

“You will recall that the Commission recommended during the hearing that S. 1384 be amended by removing the requirement of a showing that existing common carriers are unwilling or unable to render the required type of service. Upon further consideration, the Commission has unanimously voted also to recommend that the words ‘and not provided by

<sup>14</sup> Hearings, pp. 43-44, *supra*.



common carriers' be deleted from line 6 of page 2 of the bill. These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized services."

The position of the Interstate Commerce Commission in the court below and before this Court is consistent with that taken by it before the Senate Committee. On the other hand, the Contract Carrier Conference in the court below, and in its motion to affirm herein, takes the position that by deleting the language referred to, the Congress substantially changed and limited the nature of Commission consideration of a contract carrier application.

Appellants urge that deletion of the language found objectionable by the contract carriers had only the effect of maintaining in *status quo* the burden of contract carrier applicants and left the broad scope of the Commission's consideration in such cases precisely the same as it was previously. We respectfully urge that for the Contract Carrier Conference now to take a position that the considerations to be weighed by the Commission in determining consistency "with the public interest and the National Transportation Policy" are limited or restricted is a reversal of the position taken before the Senate Committee and is not warranted by the legislative history.

If more is needed to establish Congressional intent a reference to the Senate Committee report<sup>15</sup> accompanying S. 1384 is illuminating. Concluding the main body of its report the Committee said:

"Your committee is of the opinion that the public interest in a sound transportation system, and par-

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<sup>15</sup> S. Rep. No. 703., 85th Cong., 1st Ses., p. 7.

ticularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."

The background of the 1957 amendments considered, we respectfully submit that (a) there was no change in the basic standard governing contract carrier applications, (b) there was no intention whatever to curtail the discretion of the Commission in applying that standard, and (c) at most the intention was to insure consideration in all cases of the matters specified in the amendments.

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SUPREME COURT.

Nos. 49, 53, and 54

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1961

No. 49

**ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY, ET AL.,** *Appellants*  
v.

**ELVIN L. REDDISH, ET AL.,** *Appellees*  
No. 53

**INTERSTATE COMMERCE COMMISSION,**  
*Appellant*  
v.

**ELVIN L. REDDISH, ET AL.,** *Appellees*  
No. 54

**ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,**  
*Appellants*  
v.

**ELVIN L. REDDISH, ET AL.,** *Appellees*

*Appeals from the United States District Court for the Western  
District of Arkansas*

**BRIEF FOR ELVIN L. REDDISH**

**A. ALVIS LAYNE**  
Pennsylvania Building  
Washington 4, D. C.

**JOHN H. JOYCE**  
26 North College  
Fayetteville, Arkansas

*Attorneys for Appellee,  
Elvin L. Reddish*

October 2, 1961

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BRIEF FOR ELVIN L. REDDISH

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OPINIONS BELOW

The opinion of the District Court (R. 398) is reported at 188 F. Supp. 160. The report of the Interstate Commerce Commission (R. 385) is reported at 81 M.C.C. 35.

### **JURISDICTION**

The final judgment and order of the District Court was entered on October 19, 1960 (R. 411). Notices of appeal were filed on December 16, 1960 (R. 412, 416, 418). This Court noted probable jurisdiction on April 17, 1961, 365 U.S. 897 (R. 421), and consolidated these cases, which are separate appeals from the same judgment. Jurisdiction of this Court to review the final judgment and order of the District Court is conferred by 28 U.S.C. 1253 and 2101(b).

### **QUESTIONS PRESENTED**

1. May the Commission, under section 209(b) of the Interstate Commerce Act, as amended, presume an adverse effect on the services of protesting common carriers from the grant of a permit to a contract carrier to transport shipments the Commission finds have not been transported by the protesting common carriers and would not be transported by the protesting common carriers if the contract carrier application were denied?

2. May the Commission, under section 209(b) of the Interstate Commerce Act, as amended, as a condition to the grant of a contract carrier application, require the applicant and his supporting shipper to prove that existing common carrier service is not adequate to meet the transportation requirements of the shipper?

3. May the Commission, under sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended, refuse to consider the lower costs available to the shipper as a consequence of the inherent advantages of contract carrier service, in determining the distinct need of the shipper and the effect upon the shipper of a denial of the application?



### STATUTES INVOLVED

The National Transportation Policy (54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901, and 1001); section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong.); section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-412, Public Law 85-163, 85th Cong.); and section 212(c) of the Interstate Commerce Act (49 U.S.C. 312 (c), as added on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong.), are set forth in the Appendix.

### STATEMENT

Elvin L. Reddish filed an application with the Interstate Commerce Commission on May 13, 1958, for a permit to operate as a contract carrier transporting canned goods on behalf of Steele Canning Company, Cain Canning Company, and Keystone Packing Company, from three canning plants in Arkansas and one such plant in Oklahoma to customers located at points in thirty-three states, and to bring back for these canning companies, from points in thirty of those states to the plants in Arkansas and Oklahoma, materials and supplies used in producing canned goods.

Reddish lives at Springdale, Arkansas, where he owns a parking lot and a garage for the repair and maintenance of his trucks and trailers (R. 52). Prior to World War II he drove a truck for his father (R. 49). While in the Army during the War, he repaired trucks (R. 50). After the War he bought a truck and trailer which, with two others he later acquired, were used in trucking farm products, exempt under section

203(b) of the Interstate Commerce Act, 49 U.S.C. 303(b), from economic regulation of the Commission.

Beginning in 1953, Reddish leased his trucks to Steele Canning Company under contracts that required Reddish to keep the vehicles in repair. The trucks were operated by Steele's drivers and employees as a part of the extensive private carriage operation carried on by Steele in transporting its canned goods and the supplies used in production of canned goods. At the beginning of 1958, Reddish owned, and had under lease to Steele, nine trucks and trailers (R. 49-52).

Steele, Cain and Keystone, the shippers Reddish proposes to serve, are substantial canners of vegetables, potatoes, and berries, with plants in Northwestern Arkansas (R. 115, 213, 238). The sale of canned goods produced by the three companies is interrelated, since Steele normally sells and distributes about 75% of the production of Cain and Keystone (R. 373-374).<sup>1</sup> Shipments are made by Steele from the plant locations of the three companies, as well as from a plant located in Westville, Oklahoma, to customers located at a number of scattered localities in a thirty-three state area (R. 370). 80% of Steele's shipments are to small buyers who order three to ten thousand pounds of canned goods at any one time (R. 126, 371). These customers maintain low inventories, with rapid turnover of stock (R. 371). When stocks run low, customers place orders, principally by telephone, sometimes by mail or wire, on short notice, for delivery on

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<sup>1</sup> Steele ships between two and a half and three and a half million cases of canned goods annually, depending upon the crop season. Of this volume, Steele produces between 500,000 to 800,000 cases. The remainder is purchased from other canners, including Cain and Keystone (R. 116-118, 122, 123).

specified days and in some cases at specified times of day (R. 128, 129). The canning business is highly competitive. There is a narrow profit margin. Cost as well as speed of delivery are controlling factors in the customers' choice of canners from whom they will purchase. A number of competing canners in the Arkansas Valley and elsewhere provide service on small shipments in their own vehicles (R. 147-148, 201-202). Because of these competitive factors, Steele, Cain and Keystone require a transportation service that will provide prompt movement of small shipments in consolidated loads to widely scattered customers, at a cost competitive with that of private carriage or for-hire truckload movements (R. 371). Without such transportation, the shippers could not sell their canned goods (R. 173).

A number of motor common carriers protested the grant of the Reddish application, and submitted evidence of their operating authorities and facilities, expressing a desire to participate in the traffic of the three canning companies (R. 375-381).<sup>2</sup> These carriers are not used by Steele, Cain and Keystone for the low-cost, pool-truckload, multiple drop-off service required for their small shipment business from the Arkansas and Oklahoma origins (R. 391). A pool truck-load of these small shipments normally requires six or more stops in transit for pick-ups and deliveries

<sup>2</sup> Four railroads, the Western Pacific; Great Northern; Denver Rio Grande and Western; and the Santa Fe, also appeared as protestants (R. 380-381). The Examiner found that none of the rail carrier protestants served any of the points in Arkansas or Oklahoma; that the total traffic in canned goods moved outbound from the Oklahoma and Arkansas plants by any railroad in the full year 1957 had been 19 carloads (R. 380, 381); that Cain Canning Company is not on a rail siding (R. 374).

at various points in two or more states (R. 389; see, *e.g.*, R. 92, 93). The protesting common carriers do not render such a service on a consolidated load basis at truckload rates (R. 353, 354). The small shipments that would go to make up such a pool truckload are handled as individual less-than-truckload (LTL) shipments at LTL rates (R. 194, 226). The handling of such an LTL shipment of canned goods by a motor common carrier may involve a number of pick-up and delivery services, terminal handling and joint line transfers in its movement from the canning plant to the company's customer, depending upon the particular cities and towns served by the common carrier, the arrangements made by that carrier with other carriers to serve other towns, and the way in which the carriers had scheduled their equipment (R. 194, 356). Shipments of canned goods in LTL service are subject to delay and damage in handling, terminal, and interlining processes (R. 173). The cost to Steele for the movement of LTL shipments of canned goods is two to three times as high as the cost of truckload movements (R. 394).

Steele began handling its small orders in consolidated truckload movements in its own private carriage operation in 1948 (R. 371-372). As the volume of the small orders increased, Steele expanded its private carriage fleet. In 1958, Steele was operating twenty-nine truck units (R. 372). Labor difficulties, including a strike in 1958, reduced this fleet to eight truck units at the time of the hearing (R. 372).

Reddish, who had previously filed this application, was granted emergency and temporary authority as a contract carrier by the Commission, to transport pool truckloads of canned goods for Steele, and to bring

back limited types of supplies and materials for producing canned goods (R. 46, 47). This temporary authority was issued to Reddish upon a finding by the Commission that there was an immediate and urgent need for the service, and that there was no existing carrier service capable of meeting the need.<sup>3</sup> Steele, however, continued thereafter to use its own eight vehicles in private carriage, since Reddish did not then have sufficient equipment to handle Steele's requirements. Steele did not expect Reddish to invest in additional operating equipment in reliance upon only a temporary permit (R. 159, 163, 204).

Reddish began transporting Steele's outbound shipments of small orders in consolidated loads in June, 1958, using his nine trucks and trailers (R. 58). Reddish provides direct transportation of the small shipments in consolidated truckloads, making drop-offs of the small orders at the customers' places of business (R. 59-62, 93, 94). His rate schedule and shipping documents available for examination at the hearing showed that this service in pooled truck movement of

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<sup>3</sup> Section 210a(a) of the Motor Carrier Act, 49 U.S.C. 310a(a), provides: "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter." See *Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R. Co.*, 353 U.S. 436.

small shipments was performed at a cost to the shipper comparable to truckload rates of common carriers (R. 60, 83, 84, 93, 95, 191). The service rendered by Reddish to Steele under temporary authority was found by the Examiner to be substantially similar to the private carriage operations performed by Steele (R. 372).

The Examiner, on this factual showing, concluded that Reddish's proposed service would "be more responsive to shipper's transportation requirements," and that it did not appear that the grant of authority to Reddish would "have any material adverse affect [sic] upon the operations of any other carrier" (R. 382). The Examiner recommended that the application be granted.

The Commission, Division 1, concluded that the Examiner's statement of facts was correct in all material respects, and adopted it as its own (R. 388). The Commission found that none of the protestant carriers had participated in the traffic of the shippers (R. 391). The Commission further specifically found that: "If the application is denied shippers will continue to use private carriage without resorting to further common carrier service because such carriers' less-than-truckload rates are considered prohibitive" (R. 390). The Commission also noted that Keystone, following the reduction in Steele's private carrier fleet, had begun to operate two trucks in private carriage and "will supplement its fleet if the application is denied and its small orders increase" (R. 391).

The Commission concluded, nevertheless, that the application should be denied in its entirety under section 209(b) of the Act, 49 U.S.C. 309(b).



The Commission concluded that Reddish, proposing to limit his service to three interrelated shippers, would be a *bona fide* contract carrier as defined in section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) (R. 393). The Commission concluded that physical transportation of canned goods in truckload and less-than-truckload volume, with multiple pick-ups and multiple deliveries, was a transportation service that could be performed by either common carriers or contract carriers by motor vehicle (R. 393). The Commission concluded that a grant of Reddish's application would have an adverse effect upon the service of the protesting carriers, stating: "It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant" (R. 394). For this holding the Commission cited its decision in *J-T Transport, Inc.—Extension—Columbus, Ohio*, 79 M.C.C. 695, decided June 15, 1959.<sup>4</sup> The Commission in *J-T Transport* had concluded:

"... we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the Act. There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic,

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<sup>4</sup> The *J-T Transport* proceeding is before this Court in numbers 17 and 18, October Term 1961. The decision of the Commission of June 15, 1959 in that proceeding appears at pages 29-53 of the transcript of record filed in this Court in numbers 563 and 564, October Term 1960, now-renumbered 17 and 18.



even if they may not have handled it before" (J-T Record, p. 42).

The Commission held that, under section 209(b), the determination of the effect of the denial of the Reddish application upon Steele, Cain and Keystone depended upon a determination of whether "existing service is adequate to meet their transportation requirements" (R. 394). The Commission then said:

"Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about jointline service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. . . ." (R. 394).

The Commission concluded:

"In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application" (R. 394).

The Commission's ultimate conclusion, in denying the application, was:

"There has been no convincing showing by applicant that the supporting shippers have a real

need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied" (R. 395).

A petition by Reddish to the entire Commission, for oral argument and for reconsideration, was denied (R. 396-398).

Reddish filed this action against the United States and Interstate Commerce Commission, in the United States District Court for the Western District of Arkansas, to enjoin and to set aside the order of the Commission (R. 1). The United States, the statutory defendant under 28 U.S.C. 2322, filed an answer admitting the allegations of the complaint (R. 15). The Interstate Commerce Commission answered, defending the order (R. 10). Associations and groups of common carriers by motor and rail, and an association of contract carriers, were permitted to intervene as defendants and plaintiffs, respectively (R. 6, 12, 15, 17).

The District Court held that the order was invalid and should be set aside (R. 411). The Court held that statutory standards applicable to the consideration of

contract carrier applications were not authority for "limiting the inquiry" as to the effect of denial of Reddish's application to a "mere inquiry as to the adequacy of presently available service" (R. 405).

The Court held that a finding that the canning companies will not be adversely affected by a denial of the application was not supported by substantial evidence, considering all of the record, "including the evidence of the lower costs" of Reddish's service (R. 405).

The Court held that the adequacy of existing service, as applied in this case, was no different than a requirement that common carriers be "unable or unwilling" to transport the shipments. The legislative history of the 1957 amendments to sections 203(a)(15) and 209 of the Act demonstrated, said the Court,

"... that it was [not] the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide" (R. 408).

The Court held that the Commission could not ignore lower costs to the shippers in the form of rates in determining the effect that denial of the permit would have upon the shippers. The Court said:

"Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect

of a denial of the permit upon the applicant's supporting shippers. . . ." (R. 409).

The Court further concluded that the Commission had in this case improperly applied a general presumption that the protesting carriers would be adversely affected by the loss of traffic they had never handled and would not handle if the application were denied (R. 410).

#### **SUMMARY OF ARGUMENT**

Congress in 1957 sharply defined and limited the competitive role of contract carriers in the transportation industry. The 1957 changes in the statute made unnecessary and inapplicable prior decisional standards applied by the Commission in considering applications for contract carrier permits. New and different standards were written by Congress into section 209(b) governing the consideration of applications for contract carrier authority, to reflect the limited competitive role of the contract carrier in serving the distinct needs of one or a limited number of shippers.

The Commission, in considering Reddish's application, wholly failed to consider or apply the criteria specified by Congress in section 209(b) to govern the grant of contract carrier permits. Instead, the Commission (1) applied a presumption of adverse effect upon the services of existing common carriers by the grant of the Reddish application to transport canned goods shipments the protesting carriers had not transported and would not transport if the application were denied; (2) required that Reddish and his supporting shippers make a positive showing that existing carriers

would not meet the shippers' reasonable transportation needs, as a condition to the grant of the application; and (3) excluded from consideration the testimony of the shippers that the successful conduct of their businesses required transportation of canned goods at a cost competitive with private carriage and truckload rates proposed by Reddish and not available from the protesting carriers.

Such presumptions, requirements of proof, and exclusion of costs in terms of rates are based upon the pre-1957 status of contract carriers. The requirements thus imposed on contract carriers are justified neither by the terms of the statute nor the limited and special nature of contract carrier service now authorized under the statute. The Commission in fact has imposed on Reddish, as a condition to the grant of his application, requirements of proof that were not written into the Act because they were improper and unnecessary to the consideration of contract carrier applications. The standards applied to the disposition of the Reddish application deny the existence of the inherent advantages resulting from the limited obligations imposed, and the limited services permitted to be performed by contract carriers under the Act. As a practical matter, the consequence of the Commission's failure to consider the standards now specified in the Act for the consideration of contract carrier applications is to deny contract carriers the opportunity to compete with unregulated private motor truck operations. The Commission leaves shippers a choice only between motor common and private carriage.

## ARGUMENT

## L

**The Interstate Commerce Act, as Amended in 1957. Does Not Require or Permit the Commission to Presume That the Grant of Reddish's Application Will Adversely Affect the Protesting Common Carriers.**

Congress in 1957 made substantial and fundamental changes in the provisions of the Interstate Commerce Act relating to contract carriers by motor vehicle. The definition of a contract carrier in section 203(a)(15), 49 U.S.C. 303(a)(15), was amended to require that contract carrier service be performed for "... one or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." Section 209(b) was amended to give the Commission power to attach to new contract carrier permits, among other terms, "... limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation. . . ."

Congress by these changes empowered the Commission specifically to limit a contract carrier's service to designated shippers by name and number. Prior to 1957 the Commission had no such power. A contract carrier was free to add contracts and shippers within the commodity and geographical scope of its permit, and aggressively to seek new business within those limits. *United States v. Contract Steel Carriers*, 350 U.S. 409. As a consequence, contract carriers were free to compete with common carriers for transportation business generally, for all existing and potential



traffic in the commodities and within the area served by the contract carrier. The 1957 amendments were designed to restrict this ability of contract carriers to compete with common carriers, and to provide a clear line of demarcation between common and contract carriage. S. Rep. No. 703, 85th Cong., 1st Sess. (1957), p. 37; see also H.R. Rep. No. 970, 85th Cong., 1st Sess. (1957), p. 1.

The 1957 amendments further emphasized departure from the prior position of contract carriers under the Act, by adding to section 212 a new subsection (c). The new 212(c) provides that contract carriers whose operations prior to 1957 were found not to have been limited to transportation for one or a limited number of persons as required under the new definition of contract carriage, were to receive, without proof of public convenience and necessity,<sup>5</sup> certificates to operate as motor common carriers.

This sharply changed character of the contract carrier, and the limitations imposed on the ability of new contract carriers to compete with common carriers, made inapplicable the decisional standards the Commission had adopted prior to 1957, in determining whether an application for a contract carrier permit should be granted under the general and undefined statutory provisions of "consistent with the public interest and the national transportation policy." The Com-

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<sup>5</sup> Section 207(a) of the Act, 49 U.S.C. 307(a), requires an application for motor common carrier authority to establish that the proposed operation "is or will be required by the present or future public convenience and necessity."



mission, prior to the 1957 amendments, had been faced with an increasingly difficult problem of making any clear distinction, as between common and contract motor carriage, that would effectively confine contract carriers to one or a limited group of shippers. Contract carriers were free, once a permit was obtained, to compete for all traffic, present and potential. The Commission had no ready means to confine, or even to determine the extent of, the competitive effect on common carriers by rail and motor resulting from the grant of a permit. The Commission, under these circumstances, applied to the general statutory standard, "consistent with the public interest and national transportation policy" provided in section 209(b) of the Act, a requirement that an applicant for such authority prove that the services of existing carriers would not or could not meet the reasonable requirements of the shippers supporting the application.<sup>6</sup> As applied by the Commission, the standard of "consistent with the public interest and national transportation policy" in contract carrier applications was in practical effect no different than the standard of "public convenience and necessity" applied under section 207(a) of the Act to common carrier applications. Compare *William Heim Cartage Co., Inc.—Extension—Indianapolis*, 20 M.C.C. 329, 331, a contract carrier case, with *Central and*

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<sup>6</sup> *William Heim Cartage Co., Inc.—Extension—Indianapolis*, 20 M.C.C. 329, 331; *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311, 314; *Melton Contract Carrier Application*, 49 M.C.C. 59, 62; *Walter C. Benson Co., Inc.—Extension—N.Y., N.J., and Pa.*, 61 M.C.C. 128, 130.

*Southern Truck Lines, Inc., Common Carrier Applications*, 84 M.C.C. 126, 130.

Congress, recognizing the sharply changed nature of the contract carrier, and the limited extent of the competition that would result from limited contract carrier operations, wrote into section 209(b) specific criteria to be considered by the Commission in determining whether the public interest and national transportation policy would be served by a grant of a contract carrier application. Section 209(b) was amended to require that: "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers, [4] and the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements."

Under these criteria, the permissible inquiry is limited. Since the new contract carrier will not be free to compete for unknown and merely potential shippers, the inquiry as to competitive impact upon protesting common carriers is limited to considerations relating to the specific traffic of the shippers to whose service the contract carrier will be limited. Section 209(b) limits that inquiry to the "effect of a grant of the application upon the *services* of the protesting carriers." The statutory language thus limits consideration to those carriers protecting the application. More im-

portantly, it directs consideration of effect upon the *services* of the protesting carriers. The question is whether transportation by Reddish of canned goods for Steele, Cain and Keystone will affect the services protesting common carriers render for the public generally.

There was no evaluation or consideration ~~by the~~ Commission of the extent, if any, to which Reddish's service on behalf of Steele, Cain and Keystone would have any effect on the services of the protesting carriers. Indeed, there was no effort on the part of the protesting carriers to show that their services would in any way be affected by the grant of the Reddish application. There was no suggestion that the services, or the finances and facilities with which the protestants render services to shippers generally, would in any way be affected by the grant of Reddish's application, or had, in fact, been affected by Reddish's operation under temporary authority. The record contains nothing more than a description of the services offered by protesting carriers to the public, a description of their facilities, and a statement of their desire to handle such shipments as their certificates may authorize and their methods of handling shipments might permit.

The Commission wholly avoided its duty under the statute to evaluate the extent to which the grant of Reddish's application would affect the services of the protesting carriers, by applying a presumption that authorization of a new contract carrier to handle traffic that a common carrier protestant can efficiently handle would have an adverse effect on the service of that protestant. Such a presumption relieves protesting common carriers of the need to make any factual

demonstration that granting an application would have any effect upon their services. The presumption is applicable, as the Commission makes clear in this case, even though the protesting common carriers have, in fact, never handled the traffic that the contract carrier proposes to handle, and where the Commission finds that the traffic will, if the application is denied, not be transported by the protesting common carriers. This sweeping presumption is the only basis for the Commission's conclusion that authorization of Reddish would have an adverse effect on the protesting carriers (R. 394).

We submit that such presumptions of adverse effect are not permitted under section 209(b), as amended. A presumption of adverse effect may be warranted in applications for certificates of public convenience and necessity under section 207(a), where the new entrant will necessarily be a competitor for all present or potential traffic. It may have been warranted in the consideration of applications for unrestricted contract carrier permits prior to the 1957 amendments. It has no application here, where Reddish is to be limited, now and in the future, to the traffic of Steele, Cain and Keystone. The Commission, in disposing of the application on such a presumptive basis, failed to discharge the duty imposed upon it by section 209(b), to consider the effect that granting Reddish's application would have on the services of the protesting carriers.

The appellants suggest that the Commission's construction and application of the present statutory criteria are necessary to protect common carriers from the "destructive effects of over competition" in the industry (Brief of the Commission, p. 8). Neither the

language of the statute nor the limited and special role permitted to contract carriers under the 1957 amendments indicates that the Commission is empowered to impose barriers to contract carriage not contained in section 209(b), as a means of protecting common carriage from competition. The Commission exceeds its powers when it imposes barriers not enacted by Congress. *Schaffer Transportation Co. v. United States*, 355 U.S. 83. -

The argument further overlooks the Commission's findings, which establish that the common carriers long ago lost any competitive struggle for this traffic. It was lost to unregulated private carriage operations conducted by the canning companies as early as 1948, when Steele began using its own motor vehicles. Reddish is a competitor of these private carriage operations, not of existing common carriers. The Commission in this case denies to Reddish the opportunity to discharge the role that a limited contract carrier is designed to perform in the transportation industry, that of an alternative to the continual expansion of private carriage operations performed by the shippers.<sup>7</sup>

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<sup>7</sup> See the testimony before the Senate Committee considering the 1957 amendments revising the contract carrier provisions of the Act, in *Surface Transportation—Scope of Authority of I.C.C.*, Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce (1957), pp. 214, 312, 345-346 (hereafter cited as "Hearings").

## II

**Reddish and His Three Shippers Are Not Required Under Section 209(b) of the Act to Establish That the Services of Existing Carriers Are Inadequate to Transport Canned Goods.**

Section 209(b) requires the Commission to consider the effect denial of a contract carrier's application would have on the supporting shipper. The Commission held that whether the shippers will be adversely affected by a denial of the application depends upon "a determination of whether existing service is adequate to meet their transportation requirements" (R. 394). Although holding that such a determination is necessary, the Commission never makes one. Instead, after characterizing the evidence of record, other than evidence pertaining to rates, as "devoid of any substantial showing of dissatisfaction" and as "complaints . . . of a general nature and not substantiated by reference to specific instances," the Commission concludes: "In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or shippers will be adversely affected by a denial of this application" (R. 394). The Commission never finds that the existing service is in fact adequate. It merely concludes that ". . . the supporting shippers have failed to show that they are unable to obtain reasonably adequate service upon request" (R. 394).

The Commission erred in imposing such a burden on Reddish and the supporting canning companies. The legislative history of 209(b) plainly demonstrates that an applicant for a contract carrier permit and his supporting shippers were not to be required to discharge such an onerous burden of proof, in the light of the

limited and distinct services contract carriers were authorized to perform under the Act after 1957. The Commission initially proposed that Congress include in section 203(a)(15) a requirement that contract carrier service be limited to the special and individual nature required by the customer, and also that it be a "service not provided by common carriers." At the same time, the Commission proposed that section 209(b) be amended to require a showing that "existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." These proposals were opposed by contract carriers, by shippers, by the Departments of Commerce and Justice, on the ground that they would effectively put an end to the extension of contract carrier service. Sen. Report No. 703, 85th Cong., 1st Sess., p. 5; see also Hearings, pp. 11, 202-203, 214, 303, 308, 311-312, 345-346. These proposals were ultimately withdrawn by the Commission, upon "further consideration," because of the "very difficult burden of proof imposed on applicants" (Hearings, p. 27). As the text of the Act shows, the Senate and House Committees did not recommend, and Congress did not enact, such a requirement. The Court below pointed out that the so-called adequacy of service standard, as applied in this case, was no different than the imposition upon Reddish and the canned goods shippers of the burden of proving that existing carriers were unable or unwilling to transport their shipments (R. 407). The Commission's conclusion—"in the absence of a more positive showing . . . we are not warranted in finding . . . the supporting shippers will be adversely affected"—demonstrates that the Commission imposed on Reddish and the supporting shippers precisely that "very difficult burden" of proof opposed by shippers, contract carriers, and others before the



Committees considering the 1957 amendments. That burden had been specifically rejected by those Committees as inappropriate to the consideration of a contract carrier application.

The Commission erred not only in applying an entirely impermissible standard to its consideration of this application, but, as the Court below held, in making the lack of a positive showing of inadequate service decisive of the outcome. There is no suggestion that existing common carriers may not, in proceedings on contract carrier applications, show the extent and nature of their services. The protesting carriers did that without objection in the *Reddish* case. A finding by the Commission that existing service does, in fact, meet the transportation requirement, would undoubtedly be relevant to consideration of the effect upon the shipper of the application's denial. The Commission however, did not make such a finding or undertake a consideration of effect on the shippers. Measured, as it must be, in terms of the findings actually made by the Commission, its action can not be sustained as a proper discharge of its duties under the statute.

## III

**The Lower Costs and More Responsive Service Available to the Shippers Through the Inherent Advantages of Reddish's Contract Carrier Service Must Be Considered by the Commission in Its Determination of the Effect Upon the Shippers of a Denial of the Application.**

The Commission was unable to make any unequivocal finding that the service of existing carriers was adequate to meet the shippers' transportation needs, because it was compelled to find that the shippers had not used such services in the past and would not use them in the future. The Commission reached this paradoxical position by refusing to consider, as a part of the "reasonable transportation needs" or "real need" of the shippers, the canning companies' need for a small-shipment pool-truckload service equivalent in cost and service to private carriage and truckload cost and service. The interest of any commercial shipper in supporting a need for transportation service is, of course, an economic one. Whether a shipper's evidence respecting his distinct "need" is couched in terms of a requirement for rapid service to meet customer demands, or in terms of his need for transportation of small shipments in consolidated loads because of lower cost, the evidence is, in the ultimate analysis, credible only in terms of the transportation necessary to enable the shipper to sell his goods at a profitable and competitive price to his customers. A showing that the cost of the services of existing common carriers would so affect the shipper's prices in relation to those of his competitors as to injure his ability to compete with them, is involved in any aspect of shipper needs, including those the Commission suggests it would consider; for example, slow transit time (R. 394).

The Commission's refusal to consider in this proceeding the need for transportation at a cost equivalent

to private carriage, denies the existence of the very factors that distinguish contract carriage from common carriage by motor vehicle. Contract carriage under the Act, as amended in 1957, is and was designed to be a service inherently different than that performed by common carriers. The Senate Report recommending passage of the 1957 amendments stated: -

“Common and contract carriage are unlike; the degrees of regulation applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as properly to reflect these differences.” S. Rep. No. 703, 85th Cong., 1st Sess., pp. 6-7.

Contract carriers are, as the Examiner found the canning companies want Reddish to be, the “transportation department” of the shippers. As such, Reddish has cost advantages, as the record here shows, in the performance of service for his shippers. Reddish has no terminal and no terminal expenses (R. 52). He needs no terminals for the handling of shipments. The small shipments are pooled in a truckload and loaded at the canning plants by the shippers (R. 61). Shipments are transported by Reddish without “interline” or terminal handling from the canning plant direct to the customer (R. 94). Reddish has no staff of solicitors and no advertising expenses in seeking business (R. 55-56). As the “transportation department” of the canners, the movement of Reddish’s vehicles is coordinated with, and directly related to, sale and outbound movement of the canned goods produced by these three shippers, and inbound movement of supplies necessary for production. Common carriers, as a

part of their "holding out" and in performance of service for the general public, maintain terminals for the assembly and transfer of shipments, advertise their services generally and solicit the shipping public, engage in joint line arrangements with other carriers for the through movement of freight, and schedule their equipment and operations in response to the demands of the shipping public generally. These inherent differences between common and contract carriers result in cost advantages to the contract carrier in performing service for his shipper, as the Chairman of the Commission pointed out to the Committee during the consideration of the 1957 amendments to the Act (Hearings, p. 27).\*

The present case does not present the situation of an application for a motor common carrier certificate, under section 207(a) of the Act, opposed by other motor common carriers. In an application for a common carrier certificate, the applicant necessarily proposes to assume the same burdens and obligations to render service to the general public, as existing motor common carriers. There is nothing inherently different in such a proposed service to suggest that another common carrier assuming the same duties would be able to perform service at a lower cost, unless the existing rates of motor common carriers are unreasonably and improperly high. Similar considerations may have been applicable in the disposition of applications of contract carriers prior to 1957.

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\* The Commission, even at a time prior to the 1957 amendments to the Act, recognized the inherent cost advantages of contract carriage in relation to common carrier service. See: *Contracts of Contract Carriers*, 1 M.C.C. 628, 630; *Contract Minimum Charges from and to Baltimore, Maryland*, 32 M.C.C. 273, 283.

The Commission, in excluding the inherent differences in contract and common carriage and the resulting cost advantages, obliterates the sharp distinction created by the 1957 amendments. The consequence is that the Commission is able to define the shippers' "reasonable transportation needs" without any consideration of the really basic need of Steele, Cain and Keystone for transportation of small shipments at a cost that will permit them to compete with other canners making deliveries with private trucks or at truckload rates. Such a definition of the transportation needs of the canning companies permits the Commission to consider the adequacy of available service to meet the shipper's needs in a wholly unrealistic fashion. The Commission's definition of "reasonable" need is so unrelated to the business factors governing the canning industry that the shippers would be forced out of business if it were actually followed.<sup>9</sup>

This Court, in *Schaffer Transportation Co. v. United States, supra*, pointed out that the national transportation policy does not permit the Commission to ignore inherent advantages of common carrier motor service, including cost advantages, in its evaluation of an ap-

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<sup>9</sup> The Court below, treating the Commission's report as finding that the shippers would not be adversely affected by a denial of the application, held that such a finding was not supported by substantial evidence (R. 405-406). We agree that such a finding could not be supported by substantial evidence in the record of this proceeding, for the reasons given by the Court (R. 406). We can find, however, no conclusion by the Commission that the shippers would not be adversely affected. The report of the Commission does no more than conclude that "there has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service."

plication for a motor common carrier certificate opposed by common carriers by railroad. To do so, this Court held, would provide unwarranted protection against competition and would run counter to the national transportation policy, which requires the Commission to heed service efficiencies resulting from the inherent advantages of one transportation service in relation to the other.

These considerations apply with equal force here. Inherent differences resulting in cost advantages arise not only by differences in the mode of transport, but also by the sharply different functions and obligations of common and contract motor carriers in the services the statute requires each to offer and perform.

We submit that the Court below properly held that, under the present statutory standards, lower costs to the shippers in the form of rates resulting from the inherent advantage of contract carrier service may not be ignored by the Commission in its evaluation of Reddish's application.

#### CONCLUSION

Appellee, Elvin L. Reddish, for all of the foregoing reasons submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

A. ALVIS LAYNE  
Pennsylvania Building  
Washington 4, D. C.

JOHN H. JOYCE  
26 North College  
Fayetteville, Arkansas

*Attorneys for Appellee,  
Elvin L. Reddish*

October 2, 1961

## APPENDIX

## Statutes Involved

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding section 1, provides:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., provides:

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transporta-



tion services designed to meet the distinct need of each individual customer."

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-412, Public Law 85-163, 85th Cong., provides:

"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may per-

form transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 304(a)(2) and (6) of this title: *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before August 22, 1957 which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 303(a)(15) of this title, as in force on and after August 22, 1957."

Section 212(c) of the Interstate Commerce Act, 49 U.S.C. 312(c), as added on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., provides:

"The Commission shall examine each outstanding permit and may within one hundred and eighty days after August 22, 1957, institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on August 22, 1957, do not conform with the definition of a contract carrier in section 303(a)(15) of this title as in force on and after August 22, 1957; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1961**

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**No. 17**

**INTERSTATE COMMERCE COMMISSION, APPELLANT**

**v.**

**J-T TRANSPORT COMPANY, INC., ET AL.**

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**No. 18**

**U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS**

**v.**

**J-T TRANSPORT COMPANY, INC., ET AL.**

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**ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF MISSOURI**

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**No. 49**

**ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,  
APPELLANTS**

**v.**

**ELVIN L. REDDISH, ET AL.**

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**No. 53**

**INTERSTATE COMMERCE COMMISSION, APPELLANT**

**v.**

**ELVIN L. REDDISH, ET AL.**

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**No. 54**

**ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., APPELLANTS**

**v.**

**ELVIN L. REDDISH, ET AL.**

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**ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF ARKANSAS**

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**BRIEF FOR THE UNITED STATES**

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**OPINIONS BELOW**

The opinion of the district court in the *J-T Transport* case (Nos. 17 and 18) (*J-T R. 160-79*)<sup>1</sup> is

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<sup>1</sup> Citations to the record in the *J-T Transport* case appear as "*J-T R. —*," and to the record in the *Reddish* case as "*R R. —*."



reported at 185 F. Supp. 838; the reports of the Interstate Commerce Commission (*J-T* R. 22-27, 29-52) are printed at 74 M.C.C. 324, 79 M.C.C. 695. The opinion of the district court in the *Reddish* case (Nos. 49, 53 and 54) (*R* R. 398-410) is reported at 188 F. Supp. 160; the report of the Commission (*R* R. 386-95) is printed at 81 M.C.C. 35.

#### JURISDICTION

The judgment of the district court in the *J-T Transport* case (*J-T* R. 159) was entered on August 9, 1960. Timely notices of appeal (*id.* at 180-83, 184-85) were filed and probable jurisdiction was noted on February 20, 1961 (*id.* at 186; 365 U.S. 808). The judgment of the district court in the *Reddish* case (*R* R. 411-12) was entered on October 19, 1960. Timely notices of appeal (*id.* at 412-15, 416-18, 418-20) were filed, probable jurisdiction was noted on April 17, 1961 (*id.* at 421; 365 U.S. 877), and the cause was set for argument immediately following the *J-T Transport* case (*R* R. 421). The jurisdiction of this Court to review these final judgments is conferred by 28 U.S.C. 1253.

#### STATUTE INVOLVED

The pertinent statutory provisions, the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding 301, and Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 303(a)(15), 309(b), are set forth in the Appendix, *infra*, at pp. 61-64.

**QUESTIONS PRESENTED**

Section 209(b) of the Interstate Commerce Act provides that the Commission, in passing upon applications for contract motor carrier permits, must consider a number of factors, including "the effect which granting the permit would have upon the services of the protesting carriers" and "the effect which denying the permit would have upon the applicant and/or its shipper." These cases present the questions:

1. Whether the Commission may consider the "adequacy of existing service" provided by protesting common carriers, or their ability and willingness to provide a proposed service, in weighing the effects on shippers of denying, and on the services of protesting carriers of granting, the permit.

2. Whether in determining the "adequacy of existing service" the Commission (a) has placed an improper burden of proof upon the applicant and supporting shippers by requiring them to establish the inadequacy of the service offered by the existing carriers, and (b) has taken an unduly narrow view of "adequacy" that fails to consider the "distinct need of each individual customer."

3. Whether the Commission may presume that loss of actual or potential traffic by protesting common carriers to the applicant for a contract carrier permit will have an adverse effect upon services which the common carriers render the public.

In addition, the *Reddish* case presents a separate question:

4. Whether the Commission's refusal to consider the ability of the applicant to render a proposed service for the supporting shippers at lower cost than that offered by the existing carriers contravenes either the command of the National Transportation Policy that the Act be so administered as to promote economical and efficient service or the statutory requirement that the Commission consider the effect on the shipper of denying the permit.

#### STATEMENT

These are direct appeals from final judgments by three-judge district courts setting aside orders of the Interstate Commerce Commission. In each case, the Commission denied the applicant a permit to engage in contract motor carriage. In the *J-T Transport* case (Nos. 17, 18), the United States supported the order of the Commission before the district court, but has now concluded, after further analysis of the issues, that the order was erroneous. In the *Reddish* case (Nos. 49, 53, 54), the United States admitted error (see *R R. 15, 399*) and still adheres to that position.

#### THE J-T TRANSPORT CASE

*The administrative proceedings.*—On March 14, 1957, the J-T Transport Co., Inc., filed an application to extend its present operations as an irregular-route contract carrier of airplane parts by motor vehicle to the carriage of aircraft landing gear bulkheads on behalf of Boeing Aircraft Company from their supplier in Indianapolis, Indiana to Boeing's

Wichita, Kansas, plant. Hearings on the application were held before an examiner. Boeing supported the application, but several motor common carriers appeared as protestants. The principal protesting carrier, U.S.A.C. Transport, Inc., is a highly specialized irregular-route transporter of airplane parts. U.S.A.C. made a showing of its capabilities and demonstrated that it could render a service substantially identical to that proposed by J-T Transport. (*J-T R.* 33-34, 36, 110-24.) Boeing indicated that it had not sought to secure the proposed service from U.S.A.C. because of unsatisfactory damage experience with that carrier in 1953 (*id.* at 33, 101), and Boeing's witness expressed the belief that contract carriage was more practicable for Boeing than common carriage, because a contract carrier's operations could be more readily integrated with the manufacturer's production, thereby insuring necessary reductions in transit time (*id.* at 86, 90-91, 161).

The examiner filed a report on July 18, 1957, recommending grant of the permit. (*J-T R.* 16-20.) In its order of January 31, 1958, Division 1 of the Commission adopted the examiner's findings of fact (*id.* at 24) but denied the application. It found that, since "no attempt whatsoever has been shown to have been made to ascertain if the existing service is capable of meeting the needs of the supporting shippers," the applicant had not established a "need" for contract service; and a "service not needed cannot be found consistent with the public interest or the national transportation policy" (*id.* at 26-27).

On petition for reconsideration, the full Commission on June 15, 1959, denied the application (*id.* at 29-53).

*The Commission's report.*—The Commission reviewed the background of the 1957 amendments to the Interstate Commerce Act, by which Congress amended the definition of contract carriage and specified five criteria for the Commission to take into account in passing on applications for contract carrier permits (*J-T R.* 35-44).<sup>2</sup> It concluded that Congress did not intend "the abandonment of our long continued practice of considering the adequacy of existing common \* \* \* carrier service in determining whether a need has been established for a proposed contract carrier operation \* \* \*," and that, in view of the Commission's "past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted," there is "a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before" (*id.* at 41-42).

Turning to the application before it, the Commission found that J-T-Transport's proposed operations came within the new definition of contract carriage

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<sup>2</sup> The statute as amended is set forth in the Appendix at pp. 62-64, *infra*. The five criteria are (1) number of shippers to be served, (2) nature of the service proposed, (3) effect of a grant on protesting carriers' services, (4) effect of a denial on applicant and/or its shippers, and (5) changing character of shipper's requirements.

(*id.* at 45), and it then considered each of the five new statutory criteria (*id.* at 45-48). It found the applicant qualified in terms of the number of shippers to be served and of the nature of the service proposed; it found that the applicant would not be adversely affected by a denial of the grant nor, since "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C.," would the supporting shipper (*id.* at 45, 46-47). Finally, applying the presumption it had already announced, the Commission concluded that, "in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed \* \* \* a grant of authority to applicant would have an adverse effect upon that protestant" (*id.* at 45-46).<sup>3</sup>

*The court proceedings.*—The present action was instituted by J-T Transport on August 21, 1959, in the Western District of Missouri (*J-T R.* 1), and the three-judge district court rendered its decision, setting aside the Commission's orders and remanding the case to the Commission for further proceedings, on August 9, 1960 (*id.* at 160-79). After reviewing the legislative background of the 1957 amendments, the court concluded that, in considering the ability and willingness of existing common carriers to handle the traffic in question—a factor which was originally proposed by the Commission for inclusion in the statute but then withdrawn and not adopted by Congress—the

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<sup>3</sup> The fifth statutory criterion was found inapplicable (*J-T R.* 47-48).

Commission had injected a "sixth criterion, specifically rejected by Congress," and had therefore erred (*id.* at 173).

The court went on to find that the Commission had erred in imposing upon the applicant the burden of showing that existing services were inadequate (*id.* at 174). It further found that the Commission had considered the shipper's needs only in terms of "reasonable transportation needs" rather than in terms of the "distinct or specific need of the supporting shipper," and that this was error (*id.* at 177). Finally, it ruled that the Commission had erred in allowing the existence of willing and able common carriers to govern the decision of the case by applying a presumption that such carriers would be injured if denied the traffic in question (*id.* at 174-76). In so holding, the court especially noted that the record showed no actual adverse impact upon the "services" of U.S.A.C. by virtue of the grant and that such injury seemed unlikely since U.S.A.C. had never handled the traffic in question (*id.* at 176-77).

#### THE REDDISH CASE

*The administrative proceedings.*—Elvin L. Reddish filed an application on May 13, 1958, for a permit to carry canned goods by motor vehicle as a contract carrier from three points in Arkansas and one point in Oklahoma to various points in thirty-three states



(R R. 23-36).<sup>4</sup> At the hearing on this application he was supported by his three prospective shippers and opposed by various motor and rail common carriers (*id.* at 366, 368). According to the record, Reddish's service on behalf of his shippers was to be in the transport of canned fruits and vegetables to those wholesaler and retailer customers of the shippers ordering goods in less-than-truckload amounts (*id.* at 370-71, 390, 393). Because the low profit margin in the canned-goods business causes these customers (especially the smaller ones) to maintain low inventories (*id.* at 371, 389, 391), they require expedited deliveries in small quantities and on short notice (*id.* at 126-27, 148-49, 371). In addition, many of them will accept deliveries only at specified hours on certain days (*id.* at 128, 178, 245). The type of operation involved requires considerable integration and coordination between shipper and carrier; indeed, most of the shippers' competitors rely on unregulated private carriage (*i.e.*, trucks which they own and operate) for the shipment of their goods (*id.* at 147-48, 195,

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<sup>4</sup>The applicant also requested authority to transport materials and supplies needed by his contracting shippers back to their plants on the return trips from outbound deliveries. This authority was denied by the Commission, and, as we understand the basis of the lower court's vacation of the order, the agency's inbound service determination is unaffected. We believe, therefore, that this issue is not involved in the case at this stage of the proceedings.

371), as did the principal supporting shipper (Steele) for the bulk of its shipments until a strike at its plants reduced its private carrier fleet (*id.* at 370-72, 389-90).

The shippers indicated that common carriage would not satisfy the great bulk of their service needs. In order to avoid hauling goods in a partly empty truck, the traffic must be carried in consolidated loads of shipments bound for various customers, frequently in scattered locations (*R R.* 116, 128-29, 190, 194); often the available common carriers cannot consolidate the separate shipments because they are not authorized to deliver to all of the points at which the shippers have customers (*id.* at 190, 194). Moreover, consolidating loads requires careful scheduling upon short notice (*id.* at 107, 128-129, 131). Because of their lack of authority, common carriers must frequently "inter-line" the traffic (*i.e.*, unload it and reload it on another carrier); this causes substantial delays (*id.* at 194, 198), increases the likelihood of damage to the goods (*id.* at 373) and often results in misconsignment of particular shipments (*id.* at 198-99). Furthermore, the shippers testified that because the cost of common carriage was "prohibitive" for less-than-truckload shipments, they would use private carriage for such shipments if Reddish's contract carrier application were denied (*id.* at 173; see also *id.* at 390).

The protesting motor common carriers testified generally as to their ability to furnish service to the shippers (*id.* at 375-81); they indicated that they could provide multiple pickup and delivery services to

most of the points involved by interlining and that they could provide adequate less-than-truckload service (*id.* at 382, 391-93; see also, *e.g.*, *id.* at 281-85, 289-300).

The examiner concluded that the proposed contract-carrier service "will be more responsive to shipper's transportation requirements" than would common carriage and that the grant would not have "any material adverse effect upon the operations of any other carrier" (*id.* at 382); accordingly he recommended granting the application (*id.* at 384). On review, Division 1 of the Commission, although adopting the examiner's statement of the facts as its own (*id.* at 388), denied the application (*id.* at 385-95), and a petition for reconsideration was denied by the full Commission (*id.* at 396-98).

*The Commission report.*—The Commission<sup>5</sup> found that applicant came within the new congressional definition of "contract carrier" and that it qualified in terms of the number of shippers sought to be served (*R R.* 393). As to the nature of the proposed operation, the Commission found that the service needed by the shippers "could be performed by protesting common carriers as well as by applicant" (*ibid.*). Citing its decision in the *J-T Transport* case, *supra*, the Commission summarily concluded that the services of the common carriers would therefore be adversely affected by the grant (*id.* at 394).

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<sup>5</sup> In the Report of Division 1, which is the Commission's Report in this case.

The Commission found that, since the applicant was "a new entrant into the field of motor transportation," denial of the application would not affect him adversely (*ibid.*). With respect to the effect upon the shippers of a denial, the Commission recognized that the common carriers "may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries"; however, it concluded that, in view of the shippers' insufficiently "positive showing" that existing service would not meet their "reasonable transportation needs," they would not be adversely affected by a denial (*id.* at 394-95). The Commission also noted its view that the shippers' desire to obtain lower rates for their less-than-truckload traffic was the primary, if not sole, reason for their support of the application, but held that "[t]his is not a sufficient basis to justify a grant of authority to a new carrier" (*id.* at 395).\*

*The court proceedings.*—The present action was instituted by Reddish on January 27, 1960, in the Western District of Arkansas (*R R. 1*). A three-judge district court rendered a decision setting aside the Commission's order and remanding the case to the Commission for further proceedings (*R R. 398*). Primarily on the basis of the *J-T Transport* decision in the Western District of Missouri, *supra*, the court concluded that, in considering the adequacy of the service proposed by existing common carriers, the

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\* As in the *J-T Transport* case, the Commission found the fifth statutory criterion inapplicable (*ibid.*).

Commission had employed a criterion "which Congress deemed improper" (*id.* at 406-09). The court also found that the Commission's presumption that existing common carriers would be injured by the loss of potential traffic was overcome by the evidence of record that the shippers would use private carriage if the application were denied (*id.* at 410).

In addition, the court ruled that the record did not support the Commission's finding that shippers would not be adversely affected by a denial of the grant; it found the record clear that "the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized" (*id.* at 405-06). Again relying on the *J-T Transport* decision, the court also indicated that the Commission had used an improper test to evaluate the effect of denial upon shippers when it considered only the "reasonable" transportation needs of the shippers rather than their actual and distinct needs (*id.* at 410).

Finally, the court held that the Commission had erred in refusing to consider the lower rates available from contract carriage in determining the effect of denying the application upon the shippers (*id.* at 409). On the basis of the directive of the National Transportation Policy to promote "economical" service, the court found that "where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including

the lower rates \* \* \* the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers" (*ibid.*).

#### SUMMARY OF ARGUMENT

The 1957 amendments to Section 209(b) of the Interstate Commerce Act provide that the Interstate Commerce Commission, in passing upon applications for contract carrier authorizations, is to take into account (in light of the public interest and the National Transportation Policy) a number of specified factors. Among these are "the effect which granting the permit would have upon the services of the protesting carriers" and "the effect which denying the permit would have upon the applicant and/or its shipper." These cases present a number of questions as to the standards and procedures to be employed by the Commission in applying these statutory criteria to individual applications.

#### I

Although the district court opinions are not altogether clear on this point, it appears that both courts may have held that the Commission is precluded from giving any consideration at all to the ability and willingness of existing common carriers to perform the service proposed by the contract carrier applicant. If this was the ruling, we submit that it was error. The adequacy of existing common carrier service must necessarily be an important factor—indeed, it will often be the most important factor—in determining contract carrier applications, for it provides the



primary basis for evaluating the effects on shippers of denying, and on the services of common carriers of granting, the proposed permit.

The legislative history of the 1957 amendments establishes no more than that the adequacy of existing service must not become an automatically conclusive factor in contract carrier cases. The failure of Congress to enact the amendments proposed by the Commission that would have made this factor conclusive stemmed largely from concern lest too heavy a burden of proof be imposed upon contract carrier applicants and entry into the field be too severely restricted. The fact that the Commission and both the common and contract carriers supported the amendments as finally passed is clear evidence that they were not intended to preclude the Commission from taking into account the ability and willingness of existing common carriers to perform the proposed services.

## II

On the theory that the regulation of contract carriage is for the purpose of protecting common carriers, the Commission has approached the consideration of contract carrier applications in such a way as to make denial virtually automatic whenever it finds that one or more common carriers are willing and able to render the service. It is this approach that is at the heart of three challenges to the Commission's actions in the present cases: that it required applicants or their supporting shippers to prove the inadequacy of existing service, that it used an improper measure for determining the adequacy of existing service, and that it employed an unjustified pre-



sumption in determining the effect of granting a permit upon existing common carriers.

A. Common sense and the legislative history of the 1957 amendments clearly establish that the burden of showing the capability of existing common carriers to perform the proposed service is upon the protesting common carriers. The Commission fully recognizes the rule. It is contended, however, that the Commission improperly assigned that burden to the applicant or its supporting shippers in both of the present cases. While some of its statements in the *J-T Transport* case might suggest that it had imposed the burden on the applicant, the Commission's opinion taken as a whole indicates that it found the principal protesting common carrier willing and able to perform the proposed service on the basis of the record as a whole. In the *Reddish* case, however, the Commission's opinion does provide a substantial basis for concluding that the Commission improperly required the supporting shippers to prove that the existing common carriers had been tried and found unable to perform the distinct services on which the contract carrier application was based.

B. Section 203(a)(15) of the Act, as amended by the 1957 amendments, defines contract carriage in terms of a response to "the distinct need of each individual customer." It is contended that the Commission in these cases erroneously appraised the effect on shippers of denying the applications by limiting its inquiry to the question whether existing common carrier service was "reasonably" adequate

or was able to meet the shippers' "reasonable" needs. The Commission does not seem to have committed such an error in the *J-T Transport* case, where the record taken as a whole indicated an ability on the part of the protesting common carrier to meet the actual needs of the shipper. However, in the *Reddish* case, the Commission recognized that the common carriers would not be able fully to satisfy the transportation needs established by the shippers; it avoided weighing this deficiency against any actual effect the grant of a permit might have upon the protesting common carriers by concluding, erroneously, we submit, that the shippers must be satisfied with "reasonably" adequate service.

C. In both cases, the Commission, having found the existing common carriers willing and able to provide the service proposed by the applicant for a contract carrier permit, applied a presumption that the services of the common carriers would be adversely affected by the grant of the application; in each case, this conclusion was the primary basis for denying the application. The legislative history of the 1957 amendments clearly negates any notion either that ability and willingness of existing carriers might thus become conclusive, or that any one of the five criteria set forth in Section 209(b) might be given decisive force by means of a conclusive presumption unrelated to established facts.

This does not mean, of course, that considerable weight may not be given to the existence of able and willing common carriers and to the impact that granting a permit might have upon them, even in terms of potential traffic. However, that impact must be determined in the light of the facts of each particular

case, with the aid of such expertise as the Commission may properly draw upon, and the impact must be balanced against the consequences that would stem from failure to grant the permit. The Commission must consider such facts as, for example, that the shippers will not utilize the services of common carriers even if the contract carrier application is denied. Having weighed all of the relevant factors, the Commission may, indeed, arrive at general conclusions as to the balance it will strike in evaluating similar contract carrier applications in the future; however, these conclusions must be based on established facts relating to the motor transportation industry, not on a presumption, and the Commission must consider the circumstances in each new case to see whether the evidence upon any factor is sufficient to warrant a departure from the general rule.

### III

In the *Reddish* case, there was substantial evidence to the effect that the contract carrier applicant could, by virtue of economies and efficiencies inherent in his operations, and would, offer lower rates to the supporting shippers than were available from common carriers. The Commission refused to consider this evidence in appraising the effect that denial of the contract carrier application would have upon the shippers. The district court found this to have been error, and we agree.

A. The directive of the National Transportation Policy, that the Commission recognize the "inherent advantages" of each form of transportation and that

it promote "economical and efficient service," and the requirement of Section 209(b) that the Commission consider the effect of a permit denial upon the supporting shippers, clearly indicate that the Commission must give due weight to rate advantages offered by contract carrier applicants. While it may not be bound to do so when such advantages stem from mere profit-shaving, it must plainly do so when the advantages are shown to result from efficiencies and economies inherent in the nature of the contract carrier's operations. Shippers cannot be forced to resort to separate proceedings attacking the justness and reasonableness of common carrier rates in order to obtain such advantages, nor will Commission consideration of such advantages turn the proceedings upon contract carrier applications into massive rate cases.

B. Moreover, the record in the *Reddish* case did in fact establish that the rate advantages offered by the applicant stemmed from economies and efficiencies inherent in the type of contract carriage proposed. Most significantly, evidence as to economic advantages resulting from load consolidation, elimination of interlining and lack of terminal costs would, unless rebutted, have precluded a finding (had the Commission reached the issue) that the proposed rate advantages were not the result of such inherent economies and efficiencies.

#### **ARGUMENT**

##### **INTRODUCTION**

These cases present a series of interrelated issues as to the standards to be applied by the Interstate Commerce Commission in passing upon applications

for contract carrier authorizations in the light of the amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act adopted by Congress in 1957. Both cases raise an issue as to the extent to which the Commission may consider the adequacy of existing service or the ability and willingness of existing carriers to provide the service proposed by the applicant, in complying with the statutory mandate to consider the effects on shippers of denying, and on the services of protesting carriers of granting the proposed permit. Both cases also present issues as to who has the burden of establishing the capabilities of the existing carriers, and what standards the Commission is to apply in determining the effect of denial upon shippers and of a grant upon the protesting carriers. In addition, the *Reddish* case (Nos. 49, 53, and 54) presents a separate question—whether the Commission, in determining the effect of denial of a contract carrier application upon the proposed shipper, may refuse to give any consideration to a contention that the applicant proposes to provide services at lower rates than the protesting common carriers.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), prescribes the standards the Commission is to apply in passing upon applications for contract carrier permits. It provides that a permit “shall be issued to any qualified applicant” who is “fit, willing, and able” to perform contract carrier services and to conform to the Act and Commission regulations, where the proposed operation “will be consistent with the public interest and the national transportation policy declared in this Act”. By

amendment in 1957, 71 Stat. 411, there was added to this general test a provision declaring that

In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers [4] and the effect which denying the permit would have upon the applicant and/or its shipper [5] and the changing character of that shipper's requirements. [Numbers added for the Court's convenience.]

In both the *J-T Transport* and *Reddish* cases the Commission found the applicants qualified to operate as contract carriers both with respect to the number of shippers to be served and the nature of the operation,<sup>7</sup> and to conform generally to the definition of contract carrier set out in Section 203(a)(15) of the Act, 49 U.S.C. 303(a)(15). The Commission, however, denied the applications on the ground that the available common carrier service that the protesting carriers were able and willing to provide to the proposed shippers was adequate to meet their needs. Holding that there would therefore be no adverse

<sup>7</sup> The Commission's brief in the *Reddish* case appears to suggest (pp. 18-21) that the Commission had found the proposed service there not properly classifiable as contract carriage. It is clear, however, that the Commission, in the passage cited in the brief, concluded only that "the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant" (R R. 393).



effect upon the shippers by a denial of the application but that a grant would necessarily adversely affect the services of the protesting carriers, the Commission concluded that a grant of the application would be inconsistent with the public interest and the National Transportation Policy.\*

The district courts reversed in both cases. In both they appear to have held that the Commission, in considering whether existing common carriers were willing and able to provide the proposed service, had injected into the statutory standards for passing upon such applications an improper "sixth criterion" that had been proposed by the Commission itself at the time of the 1957 amendments to Section 209 but had subsequently been withdrawn (*J-T R. 173; R R. 407-08*). The courts also held that the Commission in both cases had improperly imposed upon the applicants or their supporting shippers the burden of showing the inadequacy of common carrier facilities to meet the needs of the shippers (*J-T R. 177; R R. 406*); that the record in each instance failed to support the Commission's conclusion that the needs of the shippers could in fact be met by existing carriers (*J-T R. 177; R R. 405-06, 408*) and that, to the extent the

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\* The Commission in both cases also concluded that a denial would have no adverse effect upon the contract carrier applicant, see p. 28, *infra*. The Commission also indicated (*J-T R. 47-48; R R. 395*) that the factor relating to changing shipper conditions comes into play only where a shipper already provided with a full line of transportation services by a contract carrier expands its operations and requires new services, or where future shipper requirements indicate that common carrier facilities will become inadequate.



Commission had based this determination upon a finding that such needs could be "reasonably" met, the Commission had applied an improper standard (*J-T R.* 176-177; *R R.* 410); and that the Commission, in determining that protesting carriers would necessarily be adversely affected by a grant of the applications, had improperly applied a conclusive presumption for which there was no support in the ~~record~~ (*J-T R.* 170, 176; *R R.* 410). In addition, in the *Reddish* case the court held that the Commission had erred in failing to give any consideration whatsoever to the claim that grant of the application there would provide shippers with transportation at lower rates than the protesting common carriers could or did offer (*R R.* 409).

The United States takes the position that both the courts below erred insofar as they held that the Commission is precluded from giving any consideration to the existing common carrier's ability and willingness to provide the service proposed by a contract carrier applicant. We believe that the district court in the *J-T Transport* case erred in concluding that the Commission imposed upon the applicant the burden of demonstrating the service capabilities of the common carriers, and in holding that the record failed to support the Commission's finding that the shippers' needs could be met by the protesting common carrier. We submit, however, that the Commission's decisions in both cases are invalid because, as the district courts found, the Commission reached its crucial conclusion that the existing carriers would be adversely affected by grant of the applications upon

the basis of an improper presumption unrelated to the facts of record. In our view the Commission's order in the *Reddish* case is invalid for the additional reasons that the Commission appears improperly to have imposed on the supporting shippers the burden of establishing the inadequacy of existing service, and that the Commission failed to give appropriate consideration to the needs that those shippers had demonstrated on the record, particularly their needs for transportation of less-than-truckload quantities at rates lower than the existing common carriers would offer.

## I

### THE ALLEGED ERROR IN THE COMMISSION'S GIVING ANY CONSIDERATION TO "ADEQUACY OF EXISTING SERVICE"

While it is not altogether clear, each of the courts below appears to have held that the Commission may not, in passing upon applications for contract carrier permits, even consider the adequacy of existing common carrier service or (what is in essence the same thing for these purposes) the ability and willingness of protesting common carriers to perform the service proposed by the applicant. If this was the ruling, it was error. We agree with the Commission that such consideration is not barred by anything in the Interstate Commerce Act, the 1957 amendments thereto, or their legislative history. On the contrary, this consideration, upon a proper record, may constitute the primary basis for evaluating the effect of a grant or denial of a contract carrier application

upon the protesting carriers and proposed shippers, respectively.

As the Commission points out in its brief in No. 17 (at p. 29), application of the governing standards set forth in amended Section 209(b) necessarily requires consideration of the adequacy of existing common carrier service. Plainly enough, the Commission cannot evaluate "[3] the effect which granting the permit would have upon the services of the protesting carriers" unless it determines whether the protesting carriers are willing and able to handle the traffic in question, for there will be no "effect" unless they are so willing and able. Similarly, in order to know "[4] the effect which denying the permit would have upon the \* \* \* shipper," the Commission must determine the adequacy of the common carrier service that would be available to the shipper in the event of a denial. There is absolutely nothing in the wording of the statute or in the legislative background of the 1957 amendments to suggest that the Commission was to leave out of account the most important factual element in considering these two statutory criteria.

The most that the language and legislative history of the 1957 amendments establish is that the Commission cannot deny a contract carrier application solely because common carriers are willing and able to furnish the proposed service, without regard to the other statutory criteria (see pp. 40-42, *infra*). As the Commission fully explains in Point I(C) of its brief in No. 17 (at pp. 28-45), it originally proposed an amendment to section 209(b) that would have re-

quired contract carrier applicants to show "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." One of the principal reasons for the deletion of the amendment was the common recognition of the unfair, if not impossible, burden of proof that such a requirement would impose upon contract carrier applicants. Similarly, the deletion of the Commission's proposed amendment to the Section 203(a) (15) definition of a contract carrier, which would have limited such carriers to the furnishing of special or individual transportation services "not provided by common carriers," stemmed in large part from a concern that, since many common carriers are authorized to provide highly specialized services for individual shippers, its inclusion might virtually preclude any new grants or extensions of existing permits. See *Surface Transportation—Scope of Authority of I.C.C.*, Hearings before a Subcommittee of the Senate Interstate & Foreign Commerce Committee, 85th Cong., 1st Sess., 43-44, 295-96, 301-03 (hereinafter cited as "Hearings").

The 1957 amendments were indisputably the result of compromise among the competing interests that were represented in the congressional hearings. As the bill was finally passed, it had the support not only of the Commission but of both the Common and Contract Carrier Conferences of the American Trucking Association (S. Rep. No. 703, 85th Cong., 1st Sess., 6, 7; H. Rep. No. 970, 85th Cong., 1st Sess., 2; 103 Cong. Rec. 14036). It is inconceivable that if there had been any basis whatever for supposing that avail-

ability of existing common carrier service would no longer be open for consideration in contract carrier permit cases, either the Commission or the Common Carrier Conference—who entered the hearings intending to make that factor decisive—would have lent their support to these amendments. In short, there is literally nothing about this legislation—nothing in the circumstances that give rise to its enactment, nothing in the congressional background, nothing in its plain language—that yields the slightest suggestion that the Commission was henceforth to be precluded from giving due weight to the adequacy of existing common carrier service or to the willingness and ability of those carriers to provide the service proposed.

## II

### THE ALLEGED ERRORS IN THE COMMISSION'S APPLICATION OF THE STATUTORY CRITERIA FOR DETERMINING CONTRACT CARRIER APPLICATIONS

The difficulties that the United States finds with the Commission's decisions in these cases lie not in whether the Commission may consider the adequacy of existing common carrier service or the common carriers' ability and willingness to provide a proposed service, but in the manner in which it considered them. The Commission's position on this question is quite clear. Regulation of contract carriage, it asserts, is largely, if not entirely, based upon the need for protecting common carriers; therefore it has determined that whenever such carriers are willing and able to perform a service for which shippers have

shown a need, a contract carrier application to provide the service should be denied (*J-T* R. 38, 41-42).

Reflected in terms of its post-1957 consideration of contract carrier applications under the five tests newly set out in Section 209(b), this position means that if an applicant surmounts the first two hurdles—i.e., proposes a sufficiently limited number of contracts and a service that can properly be classified as contract carriage—he will nevertheless fail if the existing common carrier service is found to be adequate or if the common carriers are willing and able to provide the proposed service. In such situations, the Commission will conclude that a denial will have no adverse effect upon the shipper whereas a grant would adversely affect the protesting carriers. The only possible qualifications to this rule would be where highly exceptional circumstances existed indicating that a denial would seriously injure the applicant contract carrier\* or that the changing needs of the shippers warranted a departure from the norm.

We believe that this position, which makes adequacy of existing common carrier service wholly determinative in virtually every case, was of doubtful

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\* Where, as in the *Reddish* case, the contract carrier applicant is not yet a permittee, the Commission holds that, for this reason, a denial "could not be said to affect him adversely" (*R* R. 394). Where he is an existing permittee, as in the *J-T Transport* case, the Commission appears to hold that a denial would leave him no worse off than he was before (see *J-T* R. 46). Conceivably, however, the Commission might find differently where, for example, an existing contract carrier has lost one account and, in seeking another, demonstrates that the revenues therefrom are essential to its continuing ability to serve other shippers.



validity under the original language of Section 209, and is clearly inconsistent with the action which Congress took, and refused to take, at the time of the 1957 amendments. We agree with the Commission that a major reason for bringing contract carriage under federal regulation was the necessity for protecting the common carriers upon whom smaller shippers are forced to rely. We further agree that in conformity with this objective—embodied in the general concept of the public interest and the specific statement of the National Transportation Policy against which Section 209 specifies all contract carrier applications are to be tested—the Commission was authorized, and in fact commanded, to give great weight to circumstances of record indicating that a grant would jeopardize actual or even potential common carrier service. But the achievement of this objective cannot, in our opinion, justify the mechanistic approach to the problem that has been adopted by the Commission.

There are at least three specific areas, each in issue in both the *J-T Transport* and *Reddish* cases, where the Commission's method of applying the valid underlying policy of protecting common carriers has been challenged. They involve questions as to (1) who has the burden of establishing the capacity of existing common carriers to perform the services the contract applicant proposes to provide to particular shippers, (2) what is the measure of adequacy that would justify a finding that a shipper's "distinct" needs can be met by the common carriers, and (3) in what circumstances can the Commission properly find that



the common carriers would be adversely affected by granting the application. We discuss them in turn.

A. *The burden of establishing "adequacy of existing service."*—Since the facts as to the capabilities of the common carriers lie peculiarly within their own knowledge, rather than with the contract carrier applicant or his shipper, common sense would indicate that the former should assume the burden of making a record as to their willingness and ability to provide the service for which a need has been shown. See 9 Wigmore, *Evidence*, § 2486 (3d ed. 1940). In any event, this question would appear to have been definitively settled by the action of the Congress in 1957 in deleting the proposed amendment to Section 209(b) that would have placed the burden on the applicant. See *supra*, pp. 25-26. Indeed, the Commission does not deny that the protesting common carriers have the burden of proof on this point (see Commission's brief in No. 17, pp. 43-44, 49). However, in both cases the lower courts appear to have found that the Commission *in fact* placed the burden on the applicant (see *J-T R.* 177; *R R.* 406).

In the *J-T Transport* case this conclusion appears to rest upon language in the Commission's report in which, after describing the capabilities of the protesting common carrier, U.S.A.C. Transport, Inc., the Commission states "we cannot find that existing service has been shown to be inadequate" (*J-T R.* 47). While this statement considered by itself might raise doubt as to the Commission's intent, we agree with the Commission that the decision as a whole need not be so interpreted. For in the *J-T Trans-*

port case the protesting carrier did in fact make a detailed showing of its capabilities (see *J-T R.* 110-124). Moreover, the Commission's subsequent findings that "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C." (*J-T R.* 47), that "the very business of U.S.A.C. is the transportation of the type of traffic involved" (*ibid.*) and that "U.S.A.C. is fully able to meet the shipper's needs" (*id.* at 49), appear adequate to constitute a determination, based upon the protestants' showing, that its service could meet the shipper's needs.

In the *Reddish* case, it is somewhat difficult to determine the precise manner in which the Commission assigned the burden of establishing the capabilities of existing common carriers to provide the needed service. A careful reading of the Commission's opinion suggests that what the Commission did was to conclude, on consideration of the evidence, that the protesting carriers had an overall capability of satisfying the general kinds of needs established by the shippers:<sup>10</sup>

The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. \* \* \* [*R R.* 393.]

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<sup>10</sup> And it was this "finding" that apparently brought into play the presumption that the protesting carriers would, therefore, be injured by a grant of the application (*R R.* 394). See pp. 39-46, *infra*.

The Commission then went on to recognize that in some respects the protesting carriers might have some difficulty in providing service of the precise character and quality required by the shippers (*id.* at 394). It concluded, however, that since the shippers had not actually used the common carriers, they had not established that "reasonably adequate" common carrier service was unavailable:

[T]he supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. \* \* \* In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application. [R R. 394.]

Two errors seem apparent from these statements of the Commission taken in the foregoing context. The first, that the Commission, in limiting its consideration to merely "reasonably" adequate service to meet "reasonable" transportation needs, employed an improper standard for determining the distinct needs of the shipper, is discussed at pp. 33-39, *infra*. Secondly, at the very least, the Commission seems to have required the shippers to assume the burden of establishing the inability of existing common carriers to provide something better than "reasonably adequate service." We submit that this is error, for, as we shall discuss in more detail in the following section, it is "the distinct need of each individual customer"

(Section 203(a)(15)) that is at issue in a contract carrier application. The burden on the protesting carriers of establishing their own ability and willingness to satisfy the "need" in question must be in the statutory terms. The Commission aggravated the error by holding that the shippers had the burden of demonstrating the contrary by actually employing common carriers for some indefinite test period, notwithstanding the shippers' undisputed testimony that they could not afford the "prohibitive" costs of doing so (*R R. 173*).

*B. The terms in which the shippers' "needs" are to be established.*—In the *J-T Transport* decision the Commission, in enunciating the principles governing its consideration of applications for contract carrier permits opposed by common carriers, states (*J-T R. 38*) that "the decisive factor [has been] whether the available common carrier service was *reasonably* adequate to meet the transportation needs involved." (Emphasis supplied.) Similarly, as we have noted above, in the *Reddish* case the Commission articulated its view of cognizable shipper needs as "reasonable transportation needs" that could be satisfied by "reasonably adequate service" (*R R. 394*). In reversing both decisions, the courts below pointed out that Section 203(a)(15) of the Act defines contract carriage in terms of the ability of the carrier to cater to the "distinct need of each individual customer" (*J-T R. 177*; *R R. 410*), and held that to the extent the Commission finds no adverse effect upon a shipper because common carriers can provide a "reasonably adequate"

service meeting many, but not necessarily all of their proven needs, it acts improperly (*ibid.*).

The issue thus presented is no mere play on words. Cf. *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 95. For in most instances the determination of whether a contract carrier application should be granted or denied resolves itself into weighing the needs of the shipper against the adverse effects upon the common carriers. It may well be that in a given case the reasons for a particular shipper's wishing to use contract carriage will be so insubstantial as to be easily outweighed by almost any public interest factor pointing the other way. But the statute requires a balancing of these competing interests, and the Commission cannot read the significant element of individual shipper need out of the equation by treating merely "reasonably adequate" service as completely meeting those needs.

As the courts below held, the notion that shipper needs can be adjudged by any such generalized objective standard as that adopted by the Commission is flatly negated by the 1957 amendment to Section 203 (a)(15) by which Congress defined contract carriage in terms of "transportation services designed to meet the distinct need of each individual customer." Moreover, this Court has itself rejected similar Commission reliance on the protesting carriers' ability to provide shippers with "reasonably adequate" service. In *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 90, the Court held that proposed motor carrier service could not be evaluated (as the Commis-

sion had there evaluated it) on the basis that existing service was "reasonably adequate"; rather, the "'relative or comparative adequacy' of the existing service"—i.e., the relative responsiveness of the competing forms of transportation to the transportation needs actually involved—"is the significant consideration when the interests of competition are being reconciled with the policy of maintaining a sound transportation system."<sup>11</sup> So here, it is the "relative or comparative" responsiveness of the common and contract carriers to the distinct needs of the supporting shipper, and not the common carrier's ability to provide "reasonably adequate" service,<sup>12</sup> that must

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<sup>11</sup> In the *Schaffer* case, the Court was concerned with the conflict between an application for common carrier motor transport authority and existing rail carriers, and the decision talks in terms of giving weight to the command of the National Transportation Policy that the Commission administer the Act with due regard to the "inherent advantages" of different modes of transportation. But regardless of whether common and contract motor carriage can be classified as constituting different "modes" of transportation, see p. 49, *infra*, it seems clear that the express directive that Congress wrote into Section 209(b) of the Act, that the Commission consider the effect of a denial of a grant upon the shippers, compels a similar result.

<sup>12</sup> The Commission argues in its brief in the *Reddish* case (p. 22, n. 9) that its use of the phrase "shipper's reasonable transportation needs" in its opinion in that case (R. R. 394) merely reflects a proper limitation of its consideration of shipper needs to those that are not "unreasonable demands bordering on shipper whim which no regulated carrier should be expected to be in a position to meet." If a contract carrier applicant is in fact willing to meet these demands we do not believe they should be totally ignored by the Commission merely because it would be unreasonable for a common carrier to meet them in view of its other responsibilities. The spectre that such consideration would allow the shipper to control the



govern the question of the "effect which denying the permit would have upon the \* \* \* shipper."

In the *J-T Transport* case the court appears to have justified on these grounds its holding that "the Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier" (*J-T R.* 177). We agree with the Commission that this ruling does not properly reflect the Commission's Report. The Commission specifically noted the testimony of the prospective shipper as to its special needs (*J-T R.* 32-33, 34). It concluded, however, on analysis of the operations of U.S.A.C. (the protesting common carrier), in the light of the shipper's specific criticisms, that "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C." (*id.* at 47), and that "U.S.A.C. is fully able to meet the shippers' needs" (*id.* at 49). These findings, we believe, were clearly within the range of the conclusions the Commission could appropriately reach in view of the detailed record evidence as to

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granting of an application is illusory since the Commission could find such needs outweighed by any demonstrable adverse effect a grant would have on the common carriers. In any event, the Commission admits a shipper "is fully entitled to have his actual needs filled" (Commission brief in No. 53, p. 22, n. 9). Yet its decision in the *Reddish* case recognizes that the common carriers are at a disadvantage "in effecting multiple pickups and deliveries," which surely are "actual needs" rather than "shipper whim[s]."



U.S.A.C.'s operations (see Commission brief in No. 17, pp. 45-52) and the relatively limited evidence introduced by Boeing to support its contentions that U.S.A.C. could not do as satisfactory a job (*J-T R.* 33, 86, 101-104).

The situation in the *Reddish* case is quite different. Here the shippers testified at length as to the inadequacy of existing common carrier service to meet their needs in dealing with many small-order grocery retailers and wholesalers, who normally keep only a 10-day stock of canned goods on hand and therefore require prompt delivery of new orders to replenish their supply as it is exhausted (*R R.* 371, 389). They stated that interlining<sup>13</sup> by the common carriers was inconvenient, damaged the goods and resulted in delay (*id.* at 194, 198-99, 373); that multiple pickups and deliveries by the common carriers were difficult to arrange (*id.* at 190, 194); and that common carrier transportation was slow and the time of delivery uncertain<sup>14</sup>

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<sup>13</sup> Where available common carriers are not authorized to deliver to all points at which a shipper has customers, they must "interline" with other carriers, *i.e.*, "tear the shipment down" at some intermediate point, and then reload onto the other carrier in order to deliver the goods. The shipment is thus delayed by the "teardown" and reload process itself, and by the often substantial delay before an appropriate truck, *i.e.*, one headed in the right direction and having space, appears on which to reload the goods. *R R.* 194. Tearing the shipment down and reloading also increases the likelihood of damage to the goods. See *id.* at 373.

<sup>14</sup> Time of delivery is important to the shippers because their customers frequently accept delivery at their loading docks at certain times of the day or on certain days of the week (*R R.* 128; see also *id.* at 178, 245 (special sales)).

(*id.* at 133, 172-173, 194). The protesting common carriers testified as to their service routes and some of them spoke generally of their ability to perform a satisfactory job (*e.g.*, *id.* at 274-79, 287-92, 301-305, 309-312). But the examiner found that "the record indicates that the proposed service [by the contract carrier applicant Reddish] will be more responsive to shipper's transportation requirements" (*id.* at 382).

The Commission, while adopting the examiner's statement of facts as "correct in all material respects" (*id.* at 388) reached a contrary conclusion. It recognized that "protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries" (*id.* at 394). It thought, however, that the shippers, as a result of their failure to experiment with the existing common carrier facilities," had "failed to show that they have been unable to obtain *reasonably* adequate service upon request" (*ibid.*, emphasis added). Thus, even apart from the Commission's failure to give consideration to the rate advantages to shippers using contract carriage (see Point III, *infra*), it seems clear that the Commission has here recognized that there are some advantages to the shippers in the proposed service but has utilized the "reasonably adequate" formula to avoid the necessary determination required

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<sup>13</sup> An experiment that, according to testimony by the shipper's witness, would have been so prohibitively expensive that it would threaten the shipper's competitive position in the industry (*R. R.* 173); see Point III, *infra*.

by Section 209(b)—namely (to paraphrase the *Schaffer* case), “whether there are benefits that [the proposed] service would provide which are not now being provided by the [protestant] carriers, whether certification of the [applicant] would be ‘unduly prejudicial’ to the existing carriers, and whether on balance the public interest would be better served by additional competitive service” (355 U.S. at 90).

*C. The Commission’s presumption of adverse effect upon existing common carriers.*—The Commission Report in the *J-T Transport* case (*J-T R. 42*) frankly states that both before and after the 1957 amendments it has applied “a presumption that the services of existing [common] carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before.” (Emphasis the Commission’s.) Consequently, although there was no evidence in the record as to the effect which granting the contract carrier permit would have on U.S.A.C., the Commission stated, “It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority would have an adverse effect upon that protestant” (*J-T R. 45-46*). And in the *Reddish* case, where the examiner had found that “a grant will [not] have any material adverse effect upon the operations of any other carrier” (*R R. 382*), and the evidence showed that the shippers would use private carriage for their less-than-truckload shipments in the event the application was denied (see *R R. 390*), the Commission, in find-

ing that the protesting common carriers would be adversely affected, merely referred in the most general terms to its earlier decision in the *J-T Transport* case (*R R. 394*).

We agree with the courts below (*J-T R. 176-177; R R. 410*) that the Commission in so holding committed reversible error. The effect of its applying the presumption, particularly with respect to a factor (effect of a grant on existing common carriers) normally considered "decisive" (*J-T R. 38*), is to define permissible contract carriage in terms of services "not provided by common carriers" despite the elimination of such language from the Section 203(a)(15) definition of a contract carrier during congressional consideration of the 1957 amendments (see p. 26, *supra*). Moreover, the Commission position is inconsistent with the action taken by Congress in adding the requirement to Section 209(b) that the Commission give consideration to five specified factors in passing upon contract carrier applications. For the directive that the Commission weigh the record evidence bearing on these several indicia cannot be squared with its giving decisive force to one of the five on the basis of a conclusive presumption totally unrelated to the facts of record.

The requirement that the Commission consider the five factors stemmed from a proposal originally made, during the course of the hearings on the 1957 amendments, by the Contract Carrier Conference of the American Trucking Association. In offering the proposal, counsel for the conference stressed his view

that the reason the Commission had had difficulty with contract carrier applications in the past "is because they have constantly been looking for some sort of magic formula that can be applied in every case instead of recognizing that it is a question of fact, and that they, as experts, should be able to make the determination" (Hearings, pp. 295-96). He stressed that in proposing standards for consideration of contract carrier applications he was not suggesting any change in the existing standard providing for a grant to qualified applicants unless it would be inconsistent with the public interest or the National Transportation Policy (*id.* at 299). But he stated (*id.* at 299-300):

there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out \* \* \* the primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration.

The actual language proposed by the Contract Carrier Conference (*id.* at 304) was virtually identical with that eventually adopted by the Congress, except that there was added the further command that the Commission also consider the effect of a denial upon shippers and the changing character



of their requirements. Neither the House nor Senate Report on the bill commented on the meaning or objective of the new language (see S. Rep. No. 703, 85th Cong., 1st Sess., 6; H. Rep. No. 970, 85th Cong., 1st Sess., 4). However, Senator Smathers, Chairman of the Subcommittee of the Senate Committee on Interstate and Foreign Commerce which handled the bill, inserted an explanation of the bill into the Congressional Record indicating, *inter alia*, that in adopting the new language "the Committee is proposing to give the Commission more helpful standards than are contained in the present law" (103 Cong. Rec. 14036).

The district court in the *J-T Transport* case (*J-T R.* 176), appears to have thought it significant that the 1957 amendment calls for Commission consideration of the effect of a grant upon the "services" of the protesting carriers (whereas a potential denial of the application was to be judged in terms of its effect upon "the applicant and/or its shipper" directly). But regardless of whether the Congress consciously intended to draw a distinction between the effect of a grant upon the common carriers and upon their services, Congress plainly intended the Commission's evaluation to be made on the basis of a reasoned analysis in which the agency brings to bear its expertise in the field in the light of the facts of record, rather than by some *a priori* presumption. See *Schaffer Transportation Co. v. United States*, *supra*, 355 U.S. at 91; *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 70. This, of course, does not mean that the Commission, in making its determina-

tion, cannot continue to give great weight to the effect a proposed grant might have upon the services of the common carriers. And we agree with the Commission that there is no reason why consideration of the effect the grant might have upon the services of the common carriers should not take into account potential as well as existing traffic. But the requisite balancing of the conflicting interests of applicant and shipper on the one hand and common carriers on the other must be made in the light of a reasoned and fully articulated consideration of the actual circumstances disclosed by the record.

The Commission in its *J-T Transport* brief (pp. 60-62), suggests that the Commission has in fact made just such a reasoned evaluation in determining, in the light of its experience in the field, that protection of the essential common carrier services requires denial of contract carriage applications wherever existing common carriers are willing and able to provide for shipper needs. The trouble with this argument is twofold: it assumes (without disclosing the evidentiary basis for the assumption) that the services of the common carriers will in fact be impaired whenever they fail to receive traffic they are willing and able to carry, and it also assumes that any such impact necessarily outweighs the advantages to the public flowing from a grant of the application. Neither of these assumptions can withstand analysis.

Thus, as the court below pointed out in the *Reddish* case (*R R.* 406, 410), in many situations the choice before the shipper may lie between utilizing the



services of the contract carrier or going into private carriage on its own. In such situations the common carriers may be no better off as a result of a denial of the application than if it had been granted. Where, as in the *Reddish* case, the record clearly indicates this is the situation, it is difficult to see how the Commission's application of the contrary presumption to deny the application, serves the National Transportation Policy, which certainly does not look toward the enhancement of the wholly unregulated private sector of the motor transport industry. This does not mean, as the Commission suggests in its brief in the *Reddish* case (pp. 22 n. 9, 26), that its decisional processes are at the mercy of the shipper's fiat. Obviously an expression of shipper intent to use private transportation if the application be denied can be tested against what it and other similarly situated shippers have done in the past as well as by an evaluation of the actual costs and service consequences of the shippers' resorting to private carriage.<sup>18</sup>

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<sup>18</sup> *American Trucking Ass'n v. United States*, 364 U.S. 1, 16 to which the Commission refers (*J-T Transport* Br. 55), supports this view. There this Court rejected a contention that a shipper's expressed disinclination to use the facilities of the protestant carriers (the shipper having stated that if it could not use the services of the railroad-owned trucker it contemplated using the services of another independent motor carrier or to provide its own transportation) deprived the protestants of standing to challenge the grant to the railroad subsidiary. The decision thus suggests that the Commission would be free to evaluate the actual likelihood of potential shipper use of common carriers despite their announced rejection of the possibility.

Even in circumstances where the common carriers could expect or hope to secure the shipper's business if the application for contract authority be denied, they may well be in such a strong financial condition that the impact of a grant upon their services would be minimal or nonexistent.<sup>17</sup> And, in a situation like that presented in the *J-T Transport* case, where both the contract carrier applicant and the common carrier protestant are engaged in highly specialized operations for a limited number of large shippers, the maintenance of adequate common carrier services might be of much less significance than in dealing with the more general types of common carriage upon which smaller shippers must necessarily rely. All such considerations are obscured when the Commission substitutes a conclusive presumption for factual analysis.

We do not suggest that the necessity for a determination based upon a balanced evaluation of all of the statutory factors in the light of the actual circumstances of record precludes the Commission from arriving at certain general conclusions as to the manner in which it expects to determine various types of contract carrier applications. The Commission need not start from scratch in every case

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<sup>17</sup> The Commission (*J-T Transport* Br. 62) points to certain factors which it believes indicate that U.S.A.C. might find the Boeing business valuable in improving or protecting its service capabilities. These are exactly the types of factors the Commission might have considered as part of a comparative evaluation of the actual impact of the grant on U.S.A.C. But it did not do so.

but, in our opinion, may announce the action it proposes to take in various types of situations in the absence of a positive showing indicating the propriety of a contrary result. Moreover, the Commission necessarily has broad discretion in drawing reasonable inferences from the facts of record upon such issues as the probable effect of a grant upon the services of protesting carriers. But the Commission is obligated under the Act to pass upon the various factors governing its decision under the statutory standards and in the light of the concrete situation before it rather than on the basis of a single uniform presumption that might or might not have validity in the particular case. This, we are convinced, it has not done in either of the cases here.

### III

#### THE ALLEGED ERRORS IN THE COMMISSION'S REFUSAL TO CONSIDER RATE ADVANTAGES OF CONTRACT CARRIAGE

In the *Reddish* case the contract carrier applicant proposed to provide a less-than-truckload service to three shippers at a materially lower cost than the rates offered by the protesting common carriers for the same service.<sup>18</sup> The Commission noted that the shippers believed that the availability of lower rates was crucial to their business survival, i.e., that they would be forced out of business if they were required to pay "prohibitive" common carrier rates (*R R.* 390), and finally concluded that shipper support for the appli-

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<sup>18</sup> Common carrier rates are at times double or triple those of the contract carrier rates (*R R.* 193-195; see also *id.* at 83-84, 353).

cation rested entirely upon their desire to obtain lower rates (*id.* at 395). But in evaluating the effect of a denial upon the shippers and in reaching its ultimate determination to deny the application, the agency swept aside all cost considerations, holding that "[t]his is not a sufficient basis to justify a grant of authority to a new carrier" (*ibid.*). In the Commission's view, "[i]f the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under [other] appropriate provisions of the act" (*ibid.*).

The district court, noting that "Congress has declared one of the goals of our national transportation policy is to promote 'economical' service" (R R. 409), concluded that "lower costs in the form of rates may [not] be ignored in determining [under Section 209 (b)] the effect denying the permit would have upon the shippers" (*ibid.*). Stressing that it was not holding that "evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers" and that "[m]ere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded" (*ibid.*), the court concluded:

\* \* \* where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the

record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. [*Ibid.*]

It is the position of the United States that the opinion of the district court, rather than that of the Commission, correctly states the law in this area. In our view, both the National Transportation Policy and the specific language of Section 209(b) require the Commission to weigh cost considerations where the record indicates that the lower proposed costs of contract carrier service result from the intrinsic nature of that service rather than from the mere willingness of the applicant to accept a lower rate of return than that specified by the common carriers in their tariffs. We also agree with the district court that the record in the *Reddish* case does in fact indicate that the applicant's proposed lower rates resulted from "economies and advantages inherent in contract carrier operation" (*R R. 409*), at least to an extent requiring consideration and analysis by the Commission going far beyond the out-of-hand rejection of the issue that characterized the Commission's action here.

*A. The Commission's policy of not considering rate advantages.*—As the Commission points out in its brief in the *Reddish* case (p. 29) its policy of refusing to consider the level of rates in determining whether a motor carrier application is consistent with the public interest and the National Transportation Policy is of "long standing". In *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 89 this Court rejected this "well established" policy as applied to a motor carrier

application opposed by railroad common carriers. Holding in the context of this motor-rail competition that the "ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy [embodied in the National Transportation Policy] requires the Commission to recognize"<sup>19</sup> (355 U.S. at 91), the Court did not pass expressly upon the validity of the Commission's practice where the competition is between two types of motor carriage (*id.* at 92).

The *Schaffer* case is, of course, controlling here if contract carrier motor transport constitutes a different "mode" of transportation from common carrier motor transport within the meaning of the National Transportation Policy. That such is the case was argued by Reddish and the Contract Carrier Conference in the court below. We agree with the district court (*R R.* 403) that it is unnecessary to reach this question in order to decide the instant case, since the National Transportation Policy is not limited to intermodal economic advantages, nor is the language of Section 209(b), requiring consideration of the effect of a denial upon shippers, so limited.<sup>20</sup>

The National Transportation Policy, by which the Commission is to be guided in administering the Act, in addition to requiring the recognition and preserva-

<sup>19</sup> See *Dirie Carriers, Inc. v. United States*, 351 U.S. 56; *Interstate Commerce Commission v. Mechling*, 330 U.S. 567.

<sup>20</sup> In so arguing, we do not concede that the "inherent advantages" clause of the National Transportation Policy is not applicable to competition between contract and common carriers engaged in motor transport.



tion of the inherent advantages of each mode of transportation, provides for the promotion of "safe, adequate, economical, and efficient service and \* \* \* sound economic conditions in transportation and among the several carriers" (see p. 61, *infra*). The Commission itself has recognized in its decision in the *J-T Transport* case that these provisions of the National Transportation Policy are pertinent to the consideration of contract carrier motor transport applications opposed by existing common carriers and that it may not ignore "any matter which might affect the good of the national transportation system as a whole" (*J-T R.* 43). While this statement was made in justification of the Commission's concern that due consideration be given to the importance of adequate common carrier facilities in maintaining a healthy transportation system, it is equally applicable here. For the National Transportation Policy cannot be a one-way street in which only the advantages flowing to the public from common carriage are to be considered but those stemming from contract carriage are ignored. Consequently, if either type of motor carriage enjoys inherent characteristics of economy and efficiency permitting it to operate at lower costs and rates, the policy of the *Schaffer* case becomes applicable regardless of whether separate ("modes" of transportation are involved. Specifically, to the extent that the lower rates of contract carriage for the less-than-carload traffic involved in this case can fairly be



said to result from the greater inherent economy and efficiency of contract carriage as opposed to common carriage, we submit that the National Transportation Policy requires the Commission to weigh this factor before reaching its decision.

If there were any doubt about the validity of this position prior to 1957 we believe it was removed by the addition of the specific provision of Section 209(b) directing the Commission to weigh the impact on the shipper of denying a contract carrier application. Nothing in the language of Section 209(b), requiring consideration of "the effect which denying the permit would have upon the \* \* \* shipper," suggests that Congress intended to limit such consideration to the physical nature of the services the shipper would lose as contrasted with their cost advantages. On the contrary, it seems self-evident that a shipper is adversely affected whenever the denial has the effect of making him pay the higher rather than the lower rates. As the district court suggests (*R. R.* 409), where rate advantages to the shipper result from mere rate-cutting or profit-shaving, the Commission may justifiably find that such advantages to the shipper are outweighed by the effect of such practices upon the protesting carriers. But where the record indicates that actual economies and efficiencies of operation are involved (and particularly where, as here, the claim is that the shipper could not survive if he is required to transport his goods at the higher

common carrier rates), the adverse effect upon the shipper of denying the application must, we submit, be weighed under Section 209(b).

It is no answer for the Commission to say—as it also did in the *Schaffer* case (see Commission Brief in No. 20, Oct. Term, 1957, pp. 26-27)—that “[i]f the shippers believe that the rates of presently authorized [common] carriers are unjust or unreasonable they should seek relief in actions against these carriers under appropriate provisions of the act” (R R. 395). Although this remedy might be effective in some situations, notwithstanding the great time and expense of prosecuting such a proceeding to a conclusion, a rate action is an illusory remedy where, as in the *Reddish* case, the proceedings would involve shipments from four points of origin to hundreds of destinations in over thirty states and via some dozen carriers. Moreover, the relevant question in passing upon a contract carrier operation is not the reasonableness or unreasonableness of existing common carrier rates, which may well be reasonable and still be significantly higher than the rates that an efficiently operated contract carrier can profitably offer, see Hearings, p. 214. Nothing in either the National Transportation Policy or the express language of Section 209(b) suggests that such genuine advantages are to be ignored in considering a contract carrier application because of

the bare possibility that in some cases shippers might be able to secure relief in a rate proceeding."

There remains for consideration the Commission's contention that appraisal of a contract carrier's proposal to provide lower rates would open the door to challenge of the lawfulness of the proposed rates by the protesting carriers, thus converting the application proceeding into a complex and prolonged rate proceeding (Commission's *Reddish* brief, pp. 31-32). While such considerations could not in any event justify ignoring the statutory mandate, we perceive no merit in the suggestion on its own terms. For one

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"The two cases (other than the *Schaffer* case) cited by the Commission in support of its contention that the courts have given approval to its policy of ignoring cost factors, are clearly not in point. *American Trucking Ass'n v. United States*, 326 U.S. 77, 86 (which the Commission also cited for this proposition in its *Schaffer* brief (at pp. 27-28)), and *Railway Express Agency, Inc. v. United States*, 153 F. Supp. 738, 741 (S.D.N.Y.), affirmed, 355 U.S. 270, both stand only for the proposition that the Commission, in approving applications, does not have to consider allegations that the applicants have engaged in, or propose illegal tariff provisions, but may defer such consideration to other appropriate post-certification proceedings. They certainly do not hold or suggest that the Commission may ignore inherent cost advantages which the applicant has over the protestants. In fact, in the *Railway Express* case the court put aside the protestant's contention that the Commission had placed improper reliance on the applicant's lower rates, since the Commission had granted the application "on the basis of evidence showing a more efficient service, at a lower cost and of a type not presently offered to shippers" (153 F. Supp. at 742, emphasis supplied).

thing, it is already established that the Commission is not required to pass upon such challenges to lawfulness of proposed fares in a certificate proceeding (see note 21, p. 53, *supra*). In addition, we note that other regulatory agencies have experienced no difficulties in taking comparative rate factors into account in determining applications for new transportation authority.<sup>22</sup> The issue presented to the Commission is not whether the particular rates proposed by the contract carrier applicant are lawful within the meaning of Section 218 of the Interstate Commerce Act but rather whether the proposed service involves economies and efficiencies in cost resulting in rate advantages to shippers that should be weighed in the balance in determining whether the application should be granted. No unduly elaborate cost analysis is necessary (if indeed any more than a qualitative appraisal is called for) in determining whether contract carrier - common carrier rate differentials stem from such factors, particularly since comparative rather than absolute levels will be in issue. As this Court has indicated elsewhere, not every Commission inquiry into comparative rate levels need assume the complexity of a fully developed rate proceeding. See *King v. United States*, 344 U.S. 254, 275.

*B. The character of the rate advantages proposed here.*—The Commission asserts in its brief in the *Reddish* case (p. 35) that “there is not a scintilla of

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<sup>22</sup> See, e.g., *New York-Mexico City Nonstop Service Case*, 25 C.A.B. 323, 326-27 (1957); *New York-Chicago Service Case*, 22 C.A.B. 973, 978 (1955); *Additional Service to Puerto Rico Case*, 12 C.A.B. 430, 431-33 (1951).

evidence in the record which would establish that the proposed lower rates result from economies, advantages, or more efficient operation of Reddish's contract carrier service." If by this the Commission means that there are no quantitative analyses of the comparative costs of operation of Reddish and the common carriers, this is quite true: since Reddish was not an existing contract carrier, such an analysis (in the extremely unlikely event that the Commission would have permitted it to have been made<sup>23</sup>), would have been difficult, if not impossible. But the absence of such analyses does not mean that the evidence of record, considered in the light of well-established principles of transportation economies, did not compel the Commission to find, as the district court found, that the lower rates Reddish proposed here "result from economies and advantages inherent in contract carrier operation" (R R. 409). For the record contained more than sufficient evidence as to the contrast between the existing and proposed operations from which the Commission could properly determine that the rate differentials reflected actual cost savings.

The record shows one of the principal economies incident to contract carriage of the type proposed by

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<sup>23</sup> As the Court observed in the *Schaffer* case (355 U.S. at 91), the Commission "has always considered rates irrelevant" in passing upon an application. See also *Southland Produce Co.*, 81 M.C.C. 625, 628 (level of rates not a factor the Commission may consider in determining whether service is in public interest, except in embargo case); *Interstate Dress Carriers, Inc.*, 77 M.C.C. 787, 791; *Carl Subler Trucking, Inc.*, 77 M.C.C. 707, 713.

Reddish is that small-order shipments by several shippers to scattered customers can more frequently be transported in consolidated loads (*R R.* 107, 128, 389; see also *id.* at 190, 194). By carefully scheduling and routing truck movements to meet customer and factory requirements,<sup>24</sup> the shipper and contract carrier can arrange to utilize the full load capacity of the truck much more successfully than could the common carrier and his shippers.<sup>25</sup> The operating costs of the contract carrier would drop in proportion to this increase in his "load factor."<sup>26</sup>

A further economic advantage of contract carriage is the elimination of the cost of interchange with connecting carriers (so-called "interlining"), that would be involved in less-than-truckload common carriage to

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<sup>24</sup>This is the practice of the private shipper competitors of Reddish's supporting shipper Steele, who own their own trucks and are thus wholly integrated by ownership into the transportation of their products (*R R.* 401-02).

<sup>25</sup>Common carriers have schedules to maintain and other customers whom they are required to serve. Section 216(d) of the Act, 49 U.S.C. 316(d), forbids common carriers to give any shipper an undue or unreasonable preference or advantage over other shippers.

<sup>26</sup>"A load factor is a direct measure of the extent to which the equipment operated by a motor carrier is being utilized. It is calculated by obtaining the ratio of loaded ton-miles per route-mile to capacity ton-miles per route-mile. A low load factor generally results in . . . a low rate of return. . . . [C]ommon carriers operating on regular schedules may have lower load factors than carriers which conduct nonscheduled operations." *Hudson & Constantin, Motor Transportation* 168 (1958); see *Hearings*, p. 27 (statement of ICC Chairman Clarke). In other regulatory fields, see, *e.g.*, *National Coal Ass'n v. Federal Power Commission*, 247 F. 2d 86 (C.A.D.C.); *New York-San Francisco Nonstop Service Case*, CAB Order E-14412, pp. 12, 14 (Sept. 2, 1959).



many, if not most, of the customers of Reddish's supporting shipper Steele (see note 13, *supra*, p. 37) (*R. R.* 373; see also *id.* at 194). Use of consolidated load shipments over a prearranged route which the contract carrier could use but which could not be served by a single common carrier eliminates the necessity for the unloading from one carrier, storing the shipments, and reloading them onto another carrier. Moreover, contract carriage operations such as those proposed by Reddish eliminate any need for terminal facilities, whether for pickup and consolidation of loads or for interlining. Thus, contrary to the statement in the Commission's *Reddish* brief at p. 35, n. 19, Reddish has no terminals or terminal costs<sup>27</sup>—unlike the protestant carriers most of which, as the Commission points out (*Reddish* brief, p. 35, no. 19), have to bear the expenses of more than one terminal.

Because of these and other intrinsic differences<sup>28</sup>

<sup>27</sup> See *R. R.* 31, 55; 1960 *Annual Rep. of E. L. Reddish*, ICC Docket No. 117,391 (Motor Carrier Annual Rep. Form B, Class II Motor Carriers of Property), p. 31.

<sup>28</sup> According to a leading transportation expert,

"There are certain differences in operations which are reflected in operating costs between contract carriers and common carriers. Contract carriers usually have no terminal facilities for platform handling of freight because they make a contract only for volume freight—which means, in effect, truckload lots. They go to the shipper's plants, load the freight, and take it directly to the consignees; and, therefore, they have no need for terminal facilities for freight handling. \* \* \* The average revenue per ton-mile of contract carriers is consistently below that of common carriers because of differences in services and costs."

Taff, *Commercial Motor Transportation* 110 (rev. ed.); accord, Landon, *Transportation* 233-234.



between the costs of common and contract carriage, which the Commission itself has frequently recognized,<sup>29</sup> the agency could not (as in fact it did not) find on the record here that the rate differentials that the shippers deemed so significant as to foreclose resort to common carriage were unrelated to the inherent economies and efficiencies of contract as contrasted with common carriage. Of course, on remand and in the light of an adequate new record, the Commission may conclude that Reddish's apparent cost advantages are illusory,<sup>30</sup> and it has broad discretion in evaluating the significance of any cost advantages. But where, as here, all of the circumstances of record

<sup>29</sup> See, e.g., Hearings, p. 23 (testimony of ICC Chairman Clarke); *Contract Minimum Charges from and to Baltimore, Md.*, 32 M.C.C. 273, 283 (1942); *New England Motor Rate Bur., Inc. v. Leivers*, 30 M.C.C. 651, 663-64 (1941). Cf. *Roofing from Elizabeth, N.J., to Norwood, Mass.*, 51 M.C.C. 258, 261 (1950); *Contracts of Contract Carriers*, 1 M.C.C. 623, 630 (1937).

<sup>30</sup> In such a reconsideration the factors mentioned at pages 35-36 of the Commission's Reddish brief might well be relevant. But so might be the evidence of Reddish's successful operation at the lower rates under the temporary authority he has enjoyed. According to Reddish's annual reports, which he is required to file with the Commission under 49 U.S.C. 320, 49 C.F.R. 205.1a, 205.13, he had been operating well in the black with a very favorable "operating ratio" of expenses to revenues. See *1960 Annual Rep. of E. L. Reddish*, I.C.C. Docket No. 117,391 (Motor Carrier Ann. Rep. Form B Class II Motor Carriers of Property), at 30; *June 30, 1961, Quarterly Rep. Revenues, Expenses, and Statistics*, ICC Docket No. 117,391 (Form QFR-II), at 1; *March 31, 1961, Quarterly Rep. Revenues, Expenses, and Statistics*, ICC Docket No. 117,391 (Form QFR-II), at 1. Copies of these reports are lodged with the Clerk of this Court.

indicate that there were, in fact, substantial cost savings in the type of contract carriage proposed by Reddish, which could properly be reflected in rates to the shippers, the Commission may not refuse to give any consideration to the claim.

#### CONCLUSION

The 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act plainly require the Commission, when it passes upon applications for contract motor carrier permits, to weigh and carefully balance against one another each of the several factors specifically enunciated in Section 209(b), and fully to articulate its reasoning in its findings. The amendments seem clearly to contemplate, moreover, that all relevant evidence will be considered in appraising these factors and that the burden of making a record on each of them lies with the party best able to produce the evidence. Finally, the amendment to Section 209(b) requires that the Commission consider the shippers' needs on which a contract carrier application is based in terms of their own distinct and specialized character.

Within this framework, we think it entirely proper for the Commission to consider the willingness and ability of existing common carriers to provide the service proposed by the applicant; and, to the extent the courts below ruled to the contrary, we think they erred. With respect to the contention that the Commission improperly imposed upon the applicants the burden of establishing the inability of existing common carriers to meet the shipper needs at issue, we do

not believe the Commission committed this error in the *J-T Transport* case; in the *Reddish* case, the Commission's action on this point is not altogether clear, related as it is to the Commission's plain error in evaluating shipper needs in general terms of "reasonableness" rather than in terms of their own distinct character. We believe that in both cases, the Commission erred in reaching the conclusion that the services of protesting common carriers would be adversely affected by the grant of an application on the basis of a presumption that any loss of even potential traffic would have a harmful effect upon protestants' services. Finally, we think the Commission erred in refusing, in the *Reddish* case, to consider rate advantages offered by the contract carrier applicant.

Accordingly, the United States respectfully urges this Court to vacate the judgments of the district courts and to direct the entry of judgments setting aside the orders of the Commission in these cases and remanding them to the Commission for further proceedings consistent with the principles set forth above.

Respectfully submitted.

ARCHIBALD COX,

*Solicitor General.*

LEE LOEVINGER,

*Assistant Attorney General.*

RICHARD A. SOLMON,

RICHARD H. STERN,

*Attorneys.*

OCTOBER 1961.

## APPENDIX

### TEXT OF STATUTE INVOLVED

**The National Transportation Policy, 54 Stat. 899,  
49 U.S.C., preceding 1, 301, 901, and 1001:**

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 303(a)(15):

SEC. 203. (a) As used in this part—

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 309(b):

SEC. 209.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent

authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within

the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.



Nos. 49, 53, and 54

Office-Supreme Court, U.S.

FILED

OCT 5 1961

JAMES R. BROWNING, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY  
COMPANY, ET AL., *Appellants*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellant*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., *Appellant*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

On Appeals From the United States District Court for the  
Western District of Arkansas, Fort Smith Division

**BRIEF FOR CONTRACT CARRIER CONFERENCE OF  
AMERICAN TRUCKING ASSOCIATIONS, INC.**

CLARENCE D. TODD  
CHARLES F. RIDDLE  
1825 Jefferson Place, N. W.  
Washington 6, D. C.  
*Attorneys for Appellee*

TODD & DILLON  
*Of Counsel*  
1825 Jefferson Place, N. W.  
Washington 6, D. C.

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BRIEF FOR CONTRACT CARRIER CONFERENCE OF  
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**OPINIONS BELOW**

The opinion of the statutory three judge District Court (R. 398) is reported at 188 F. Supp. 160. The report of the Interstate Commerce Commission (R. 385) is published at 81 M.C.C. 35.

## **JURISDICTION**

The final judgment and order of the District Court was entered on October 19, 1960 (R. 411). Probable jurisdiction was noted on all appeals on April 17, 1961 (R. 421), and Nos. 49, 53 and 54 were consolidated. Jurisdiction of this Court to review the final judgment and order of the District Court is conferred by 28 U.S.C. 1253 and 2101(b).

## **STATUTES INVOLVED**

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901 and 1001; section 203(a)(15) of the Interstate Commerce Act; 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong.; and section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-412. Public Law 85-163, 85th Cong., are set forth in the Appendix.

## **STATEMENT OF THE CASE**

The Contract Carrier Conference will not make a separate statement of the case, but relies upon the statement of appellee Elvin L. Reddish.

## **QUESTIONS PRESENTED**

1. Whether, under the 1957 amendments to section 203 (a)(15) and 209(b) of the Interstate Commerce Act, the Commission may, in passing upon applications for contract carrier permits, base its determination on the willingness and ability of common carriers to render the proposed service.

2. Whether the specific criteria set forth in section 209(b) of the Act represent a change in the standards for determining consistency with the public interest and the national transportation policy and whether the Commission improperly interpreted and applied these criteria.

3. Whether, in determining the distinct needs of the shipper under section 203(a)(15) and in weighing the effect which granting the permit would have upon the services of the protesting carriers against the effect which denying the permit would have upon the shipper under section 209(b), the Commission may disregard lower costs inherent in a proposed contract carrier service, particularly where because of this factor the shippers' choice must be between private and contract carriage.

#### **SUMMARY OF ARGUMENT**

This is the second decision of a three judge District Court reversing the Commission's interpretation of the 1957 amendments to sections 203(a)(15) and 209(b) of the Interstate Commerce Act. Both courts agreed that these amendments were intended to draw a sharper distinction between contract and common carriers and to provide the Commission with specific criteria to be considered in determining whether a proposed contract carrier service was consistent with the public interest and the national transportation policy.

The legislative history of the amendments indicate that Congress did not intend that the Commission should determine the propriety of issuing contract carrier permits on the basis of the willingness and ability, or lack thereof, of a common carrier to render the proposed service. As applied by the Commission there is no difference in a willingness and ability test and an adequacy of existing service test. Neither are relevant considerations in passing upon contract carrier applications.

In this proceeding the Commission also failed to give proper consideration to the lower costs inherent in the proposed contract carrier service. The shippers have been engaged in private carriage and intend to continue this operation if the service here proposed is not authorized, because they consider the less-than-truckload rates of com-

mon carriers to be prohibitive. The inherent advantages of contract carriers is a factor to be considered, particularly where failure to do so presents the shipper with no alternative but to continue private carrier operations.

### ARGUMENT

#### **I. IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT UNDER SECTION 200(b) OF THE INTERSTATE COMMERCE ACT THE WILLINGNESS AND ABILITY OF COMMON CARRIERS IS NOT A RELEVANT CONSIDERATION**

The issues in this proceeding are substantially the same as those raised in *Interstate Commerce Commission v. J. T. Transport Company, Inc., et al.*, and *U.S.A.C. Transport, Inc., et al. v. J-T Transport Company, Inc., et al.*, Nos. 17 and 18.

The Court below reversed the Interstate Commerce Commission in this proceeding as did the District Court in *J. T. Transport Co., Inc., v. United States, and Interstate Commerce Commission*, 185 F. Supp. 838 (W.D. Mo., 1960). Thus two statutory three judge District Courts, representing a total of five justices, agree that the Commission may not consider the willingness and ability of common carriers to perform the proposed service.

In the instant proceeding the District Court in discussing this question stated (R. 407):

"Our study of the legislative history of this Act convinces us that the deletion of the willingness and ability test was at the specific protest of the contract carriers, some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law



85-163, 71 Stat. 411). See, *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959)."

The Court also found (R: 408):

"We do not believe that it was the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide. Sufficient tests and safeguards to control the granting of contract carrier permits are contained in the law to protect common carriers without the imposition by the Commission of a test which Congress deemed improper."

This view is in accord with that expressed by the Court in the *J-T Transport* case, *supra*. The Contract Carrier Conference has argued this point extensively in its brief in Nos. 17 and 18, and rather than repeating this material here, we respectfully refer the Court to that discussion.

**II. THE CRITERIA SET FORTH IN SECTION 209(b) OF THE ACT REPRESENT A CHANGE IN THE STANDARDS FOR DETERMINING CONSISTENCY WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY AND DO NOT INCLUDE AN ADEQUACY OF EXISTING SERVICE TEST**

This issue is also a major part of the argument of the Contract Carrier Conference in its brief in the *J-T Transport* case, and we ask that the Court refer to the discussion contained therein. We would point out, however, that again two District Courts agreed that the Commission had improperly applied the criteria of section 209(b), and that there is no difference between the willingness and ability test and the adequacy of service test. The Court below stated (R. 407-408):

"We do not believe that there is any difference between the 'willingness and ability' test deleted by Congress from the bill proposed by the Commission and the 'adequacy of service' test which the Commission

said it applied in this case—a separate test, it maintains, from the one deleted. We believe that the Commission's own opinion in this case shows that it did apply the 'willingness and ability' test:

'Applicant argues in his reply (referring to the 1957 amendments) that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11195 (Sub No. 100) J-T Transport, Inc., Extension—Columbus, Ohio, M.C.C., decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common carrier service is a relevant matter which must be considered in disposing of contract carrier applications.' "

The Court also stated that as applied by the Commission in this case there is no distinction between the adequacy test and the test of proving public convenience and necessity that must be met by applicants for a common carrier certificate (R. 405).

**III. THE COMMISSION MAY NOT DISREGARD LOWER COSTS INHERENT IN A PROPOSED CONTRACT CARRIER SERVICE. PARTICULARLY WHERE BECAUSE OF THIS FACTOR THE SHIPPER MUST CHOOSE BETWEEN PRIVATE AND CONTRACT CARRIAGE**

The factual situation presented here differs in part from that in the *J-T Transport* case, *supra*. Most of the traffic involved has previously moved in private carriage. The shippers consider the less-than-truckload rates of common carriers prohibitive. In their judgment they cannot use the services of common carriers for small shipments because of the cost involved. If Reddish does not obtain authority to perform the required service, the shippers will continue to use private carriage without resorting to further common carrier service (R. 390-391).

The foregoing facts are recited in the Commission's findings. The only logical conclusion which can be drawn from these facts with respect to the third and fourth criteria in section 209(b) is that (1) the granting of the application can have no adverse effect on the services of protesting carriers, and (2) denial of the permit will deprive the shippers of a service responsive to their distinct needs. It should not have been necessary here to engage in a presumption, as the Commission did in the *J-T Transport* case, that loss of potential traffic would adversely affect protesting carriers, for the evidence shows that they will not receive this traffic if the application is denied inasmuch as the shippers intend to continue the use of private carriage in this event. The District Court found (R. 410):

"Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the report, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied."

Both here and in its brief in the *J-T Transport* case,<sup>1</sup> the Commission relies on language from *American Trucking Associations v. United States*, 364 U.S. 1, 18, 80 S. Ct. 1570, 1580 as suggesting that assertions by shippers that they would not tender traffic to protesting carriers would allow shippers to dictate the Commission's power. So far as we can see, this language relates only to the appellants' standing to maintain the action in that case and does not carry the significance attached to it by the Commission.

The Commission also contends that it has made a permissible judgment on the record before it, and that in overturning that judgment the Court made findings based on its own evaluation of the evidence thereby substituting its

<sup>1</sup> Commission's main brief, p. 26.

judgment for that of the Commission. We disagree entirely with this contention. We find no indication that the Court attempted to re-evaluate the evidence. It simply found that the Commission had misapplied the statute, and, among other things, should have considered the lower cost of service in determining the effect which denying the permit would have upon the shippers.

The Commission's disregard for the shippers' requirement for transportation at a price comparable to private carriers ignores the existence of one of the factors which distinguish contract carriage from common carriage by motor vehicle. Contract carriage under the Act as amended in 1957, is and was intended to be a service inherently different than that performed by common carriers. In Sen. Rep. No. 703, 85th Cong., 1st Sess. (1957), which recommended passage of the 1957 amendments, the Committee states (pp. 6-7):

"Common and contract carriage are unlike; the degrees of regulation applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as properly to reflect these differences."

As this Court recognized in *Schaffer Transportation Company v. United States*, 355 U.S. 83, 89, 78 S. Ct. 173, 177 (1957):

"Viewing these conclusions in light of the National Transportation Policy we find at the outset that there has been no evaluation made of the 'inherent advantages' of the motor service proposed by the applicant. That policy requires the Commission to administer the Act so as to 'recognize and preserve the inherent advantages' of each mode of transportation."

The Court was there considering rail service as distinguished from motor carrier service which are decidedly

separate modes of transportation. Whether or not contract carriage should be considered a separate mode of transportation, we believe that the National Transportation Policy, particularly in view of the 1957 amendments to sections 203(b) and 209(b) of the Act, contemplates the protection of such inherent advantages as they may have, including lower costs. Furthermore, the National Transportation Policy is designed to promote economical service, and where a contract carrier can offer a more economical service this fact should be considered in deciding the effect which a denial of the permit would have upon the shipper, as well as whether such service meets the distinct needs of the shipper.

The Commission avoids the issue by citing its own precedents holding that the level of rates is not a proper matter for consideration in application proceedings for motor common or contract authority. The justification for this position is said to be that if the rates of existing carriers are unjust or unreasonable, appropriate relief is available under other provisions of the Act. *Carl Subler Trucking, Inc.—Southern States*, 77 M.C.C. 707, 713. It may be that under a public convenience and necessity standard, provided by statute in the case of a common carrier and often applied to contract carriers as a practice of the Commission, rate levels as such are not directly involved unless they are so high as to constitute an embargo on the traffic. Under the 1957 amendments, however, lower costs resulting from a contract carrier operation whether in the form of rates or otherwise, are appropriate for consideration, and that the District Court committed no error in so finding.

It is clear that the shippers here consider common carrier costs on less-than-truckload traffic to be prohibitive and that they intend to continue to engage in private carriage unless this application is granted. That they have done so in the past is a valid indication that they will do so in the future. As a result, common carriers will not

receive the traffic<sup>2</sup> and the shippers will not receive the benefits of a low cost equivalent of private carriage which is inherent in the proposed contract carrier service. The Commission refused to give appropriate consideration to these factors, and its failure to do so contributed to its general misinterpretation of the statute.

### CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

CLARENCE D. TODD

CHARLES F. RIDDLE

1825 Jefferson Place, N. W.

Washington 6, D. C.

*Attorneys for Appellee*

TODD & DILLON

*Of Counsel*

1825 Jefferson Place, N. W.

Washington 6, D. C.

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<sup>2</sup> Significantly in *Caledonia Lines, Inc., Extension—Utica, N. Y.*, No. MC-108313 (Sub No. 7), Division 1, July 31, 1961, the Commission in granting a contract carrier application stated:

“A grant of the requested authority will not deprive protestants of any traffic they now handle. Moreover, it is not likely that protestants would be tendered any of the involved traffic if the instant application were denied.”

**APPENDIX****Statutes Involved**

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides as follows:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., provides as follows:

Sec. 203. (a) As used in this part—

•       •       •       •       •



(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-12, Public Law 85-163, 85th Cong., provides as follows:

Sec. 209.

. . . . .

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a

permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carriers shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.